UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA,

Plaintiff,

vs.

RAYMOND WILSON;
TERESA A. WILSON;
COMMUNITY BUILDERS, INC.;
ROGERS COUNTY LOAN COMPANY;
COUNTY TREASURER, Rogers County, Oklahoma; BOARD OF COUNTY COMMISSIONERS, Rogers County, Oklahoma,

Defendants.

FILED

MAR 08 1996

Richard M. Lawrence, Clerk
U.S. DISTRICT COURT

ENTERED ON DOCKET

DATE MAR 8 1996

Civil Case No. 95-C 193K

REPORT AND RECOMMENDATION OF UNITED STATES MAGISTRATE JUDGE

NOW on this 21st day of February, 1996, there comes on for hearing before the Magistrate Judge the Motion of the United States of America to confirm the sale made by the United States Marshal for the Northern District of Oklahoma on December 7, 1995, pursuant to an Order of Sale dated August 10, 1995, of the following described property located in Rogers County, Oklahoma:

All of Block 174 of the City of Claremore, Rogers County, Oklahoma, according to the U.S. Government Plat thereof.

Appearing for the United States of America is Loretta F. Radford, Assistant United States Attorney. Notice was given the Defendants, Raymond Wilson, Teresa A. Wilson, Community Builders, Inc., Rogers County Loan Company, County Treasurer and Board of County Commissioners, Rogers County, Oklahoma, by mail, and they do not appear. Upon hearing, the Magistrate Judge makes the following report and recommendation.

The Magistrate Judge has examined the proceedings of the United States Marshal under the Order of Sale. Upon statement of counsel and examination of the court file, the Magistrate Judge finds that due and legal notice of the sale was given by publication once a week for at least four weeks prior to the date of sale in the Claremore Daily Progress, a newspaper published and of general circulation in Rogers County, Oklahoma, and that on the day fixed in the notice the property was sold to CRAT Property Co., its being the highest bidder. The Magistrate Judge further finds that the sale was in all respects in conformity with the law and judgment of this Court.

It is therefore the recommendation of the United States Magistrate Judge that the United States Marshal's Sale and all proceedings under the Order of Sale be hereby approved and confirmed and that the United States Marshal for the Northern District of Oklahoma make and execute to the purchaser, CRAT Property Co., a good and sufficient deed for the property.

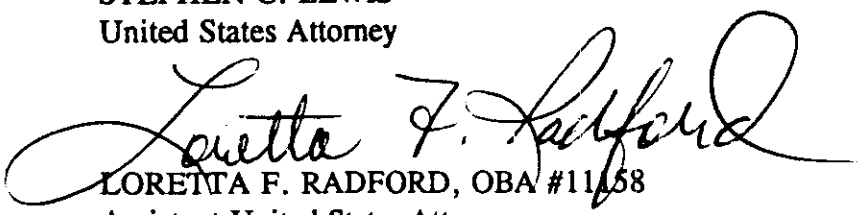
It is the further recommendation of the Magistrate Judge that subsequent to the execution and delivery of the Deed to the purchaser by the United State Marshal, the purchaser be granted possession of the property against any or all persons now in possession.

/S/ JOHN LEO WAGNER
UNITED STATES MAGISTRATE JUDGE

UNITED STATES MAGISTRATE JUDGE

APPROVED AS TO FORM AND CONTENT:

STEPHEN C. LEWIS
United States Attorney



LORETTA F. RADFORD, OBA #11158
Assistant United States Attorney
3460 U.S. Courthouse
Tulsa, Oklahoma 74103
(918) 581-7463

LFR:flv

Report and Recommendation of United States Magistrate Judge
Civil Action No. 95-C 193K

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA,

Plaintiff,

vs.

RAYMOND WILSON;
TERESA A. WILSON;
COMMUNITY BUILDERS, INC.;
ROGERS COUNTY LOAN COMPANY;
COUNTY TREASURER, Rogers County, Oklahoma; BOARD OF COUNTY COMMISSIONERS, Rogers County, Oklahoma,

Defendants.

Civil Case No. 95-C 193K

REPORT AND RECOMMENDATION OF UNITED STATES MAGISTRATE JUDGE

NOW on this 21st day of February, 1996, there comes on for hearing before the Magistrate Judge the Motion of the United States of America to confirm the sale made by the United States Marshal for the Northern District of Oklahoma on December 7, 1995, pursuant to an Order of Sale dated August 10, 1995, of the following described property located in Rogers County, Oklahoma:

> **All of Block 174 of the City of Claremore, Rogers County, Oklahoma, according to the U.S. Government Plat thereof.**

Appearing for the United States of America is Loretta F. Radford, Assistant United States Attorney. Notice was given the Defendants, Raymond Wilson, Teresa A. Wilson, Community Builders, Inc., Rogers County Loan Company, County Treasurer and Board of County Commissioners, Rogers County, Oklahoma, by mail, and they do not appear. Upon hearing, the Magistrate Judge makes the following report and recommendation.

The Magistrate Judge has examined the proceedings of the United States Marshal under the Order of Sale. Upon statement of counsel and examination of the court file, the Magistrate Judge finds that due and legal notice of the sale was given by publication once a week for at least four weeks prior to the date of sale in the Claremore Daily Progress, a newspaper published and of general circulation in Rogers County, Oklahoma, and that on the day fixed in the notice the property was sold to CRAT Property Co., its being the highest bidder. The Magistrate Judge further finds that the sale was in all respects in conformity with the law and judgment of this Court.

It is therefore the recommendation of the United States Magistrate Judge that the United States Marshal's Sale and all proceedings under the Order of Sale be hereby approved and confirmed and that the United States Marshal for the Northern District of Oklahoma make and execute to the purchaser, CRAT Property Co., a good and sufficient deed for the property.

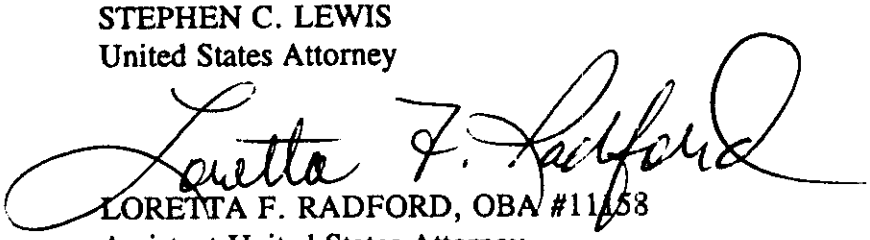
It is the further recommendation of the Magistrate Judge that subsequent to the execution and delivery of the Deed to the purchaser by the United State Marshal, the purchaser be granted possession of the property against any or all persons now in possession.

/S/ JOHN LEO WAGNER
UNITED STATES MAGISTRATE JUDGE

UNITED STATES MAGISTRATE JUDGE

APPROVED AS TO FORM AND CONTENT:

STEPHEN C. LEWIS
United States Attorney



LORETTA F. RADFORD, OBA #11458
Assistant United States Attorney
3460 U.S. Courthouse
Tulsa, Oklahoma 74103
(918) 581-7463

LFR:flv

Report and Recommendation of United States Magistrate Judge
Civil Action No. 95-C 193K

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

JOHN Q. HAMMONS, an individual) d/b/a HAMMONS INDUSTRIES, JOHN) Q. HAMMONS HOTELS, INC., a) Delaware corporation, PAUL R.) CHASTAIN, an individual, and) KINARK CORPORATION, a Delaware) corporation.)
)
Plaintiffs,)
)
vs.)
)
LATA ENTERPRISES, LTD., an) Illinois corporation and) GROVER E. BAUER, an individual) d/b/a BAUER & ASSOCIATES) REALTORS.)
)
Defendants.)

No. 95-C-1131-K

O R D E R

Before the Court is the motion of the plaintiffs to remand. Plaintiffs commenced a state court action on September 13, 1995, seeking a declaratory judgment holding plaintiffs free from any and all liability to defendants. (The state action is an attempt to trump a federal court action, 95-C-220-K, brought in the Northern District of Oklahoma by shareholders of Lata Enterprises ("Lata") against various parties, including some of the plaintiffs in the case at bar.)

On November 13, 1995, Hima Bindu Narumanchi, as "ex-Secretary/Treasurer of Lata Enterprises, Ltd.", filed a notice of removal to this Court. The notice of removal does not expressly state the basis for federal jurisdiction. On December 7, 1995, plaintiffs filed the present motion, raising several grounds for

remand.

First, it is undisputed Lata is a suspended foreign corporation. Oklahoma law permits service upon such a corporation by serving the Oklahoma Secretary of State. 18 O.S. §1136. It is undisputed such service was achieved on October 10, 1995. 28 U.S.C. §1446(b) requires a removing party to file a notice of removal within thirty days of service of process. Therefore, the filing of the notice of removal in this case was untimely. It is recognized "[t]he time limitations in Section 1446 are mandatory and must be strictly construed." 14A Charles A. Wright, Arthur R. Miller & Edward H. Cooper, Federal Practice and Procedure §3732 at 527 (2d ed.1985). Remand is required if the deadline is not met. Luce v. Lloyd's of London, 868 F.Supp. 625, 626 (D.Vt.1994). Plaintiffs have cited no cases imposing the thirty-day limit when service is made upon a state Secretary of State as opposed to personally upon the defendant. The Court need not decide the issue, because remand is appropriate on other grounds.

Plaintiffs also assert lack of standing to remove on the part of Hima Bindu Narumanchi, because she is not a party to this litigation, but only an ex-officer or ex-shareholder of Lata. Although the Court has again found no cases raising this precise issue, the Court finds plaintiffs' argument to be well taken. It is established lack of standing on the plaintiff's part requires remand of a removed case to state court. Wheeler v. Travelers Ins. Co., 22 F.3d 534, 540 (3rd Cir.1994). By analogy, if removal is attempted on behalf of a corporate defendant by a purported

representative who lacks standing, remand would also seem appropriate.[1]

Plaintiffs point out (1) Lata is a suspended corporation and, pursuant to 68 O.S. §1212(c), lacks the capacity to sue or defend in any court of the state and (2) Lata is not represented by counsel as required by Oklahoma law. The Court has already agreed with these propositions in the Order filed December 19, 1995 in Case No. 95-C-220-K, and accepts them here. This "defenseless" posture arguably makes removal improper. Again no case law apparently exists on the issue, but the Court concludes remand is appropriate on this ground as well.

Finally, plaintiffs correctly note their state court petition seeks relief solely under state law, and the notice of removal contains no allegation of complete diversity of citizenship.[2] Where the parties in a case are not diverse, removal normally is only justified if federal question jurisdiction is apparent from

---

[1]Radha R.M. Narumanchi and Radha B.D. Narumanchi have attempted to obviate this defect by filing a motion to substitute for Lata as party defendants. This is improper, as the propriety of removal must be judged as of the time the notice of removal is filed, and the motion is denied.

[2]Plaintiff Chastain and Defendant Grover E. Bauer are described as residents of Tulsa County, Oklahoma. Bauer did not join in the removal petition and the record does not indicate definitively whether Bauer has been served in the state court action. Ordinarily, defendants who are unserved when the removal petition is filed need not join in it. Getty Oil v. Ins. Co. of North America, 841 F.2d 1254, 1261 n.9 (5th Cir.1988). This rule does not apply to defendants who are citizens of the forum state. See Pullman Co. v. Jenkins, 305 U.S. 534, 541 (1939).

the plaintiff's petition.[3] When neither federal question jurisdiction nor diversity jurisdiction is present, a federal court must remand the suit to the state court where it originated. L.P. Commercial Corp. v. Caudill, 870 F.Supp. 743, 746 (S.D.Tex.1994). 28 U.S.C. §1447(c). Such is the situation here.

Inasmuch as Lata has been dismissed as a party from 95-C-220-K, it is not clear how any ruling obtained in state court against a suspended corporation will assist these plaintiffs in their federal litigation. The fact is this Court lacks jurisdiction over this action and remand to the state forum is required.

It is the Order of the Court that the motion of the plaintiffs to remand is hereby GRANTED. This action is hereby remanded to the District Court of Tulsa County, State of Oklahoma. Defendants' motion for substitution as party defendants is hereby DENIED. Plaintiffs' application for attorney fees and costs is hereby DENIED.

ORDERED this 6 day of March, 1996.

TERRY C. KERN
UNITED STATES DISTRICT JUDGE

[3]A narrow exception to the "well-pleaded complaint" rule permits federal courts to exercise jurisdiction over state law claims that have been completely preempted by Congress. Defendants do not assert preemption and the Court, upon review, sees no basis for such an assertion.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

IN RE:

ASBESTOS LITIGATION,

RONALD L. MILLER, et al.

Plaintiffs,

v.

FIBREBOARD CORPORATION, et, al.

Defendants.

No. 90-C-280-R

O R D E R

Now before this Court is Plaintiffs' Motion for Judgment Notwithstanding the Verdict, and in the Alternative, for a New Trial. In accordance with a jury verdict rendered on June 29, 1995 entered in favor of the Defendant Owens-Corning Fiberglass Corporation and against the Plaintiffs, this Court entered judgment in favor of the Defendant on all claims. Plaintiffs now urge the Court to enter a judgment notwithstanding the verdict, or in the alternative, to enter a judgment for a new trial, Fed.R.Civ.P. 50(b), 59, on the following grounds: (1) the verdict was against the great weight of the evidence; (2) the admission of Threshold Limit Values ("TLVs") was improper because Owens-Corning never provided any evidence of reliance or compliance with the TLVs; (3) evidence of general state of the art, such as the testimony of Dr. Tom Howard, was irrelevant and should have been excluded; and (4) evidence of exposure of Paul Miller to settling and/or bankrupt Defendants' products should have been excluded. (See Plaint. Br. at

57

1-2.)

I.

The Court will first take up grounds two through four, which pertain to evidence that Plaintiffs contend was improperly admitted. Defendant Owens-Corning accurately points out that Plaintiffs did not enter contemporaneous objections when the above-referenced evidence and testimony was proffered at trial. (Def. Resp. at 4.) The Federal Rules of Evidence provide:

> **(a) Effect of erroneous ruling.** Error may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected, and
>
> **(1) Objection.** In case the ruling is one admitting evidence, *a timely objection or motion to strike appears of record, stating the specific ground of objection,* if the specific ground was not apparent from the context . . . .

Rule 103(a)(1), Fed. R. Evid. (emphasis added).

The sanction for failure to make a timely objection under Rule 103(a)(1) is the loss of the right to have the decision reviewed on a motion for a new trial. New Market Investment Corp. v. Fireman's Fund Insurance, 774 F. Supp. 909, 917-18 (E.D. Pa 1991). See United States v. Hubbard, 603 F.2d 137, 142 (10th Cir. 1979)(holding that failure to make proper and timely objection at trial constitutes waiver of objection on appeal); United States v. Kilburn, 596 F.2d 928, 934 (10th Cir. 1978) (same), cert. denied, 440 U.S. 966 (1979). Plaintiffs contend that their request for a jury instruction at the instruction conference held at the conclusion of trial constituted a timely objection. This Court does not agree. For an objection to be timely for purposes of Rule

103(a)(1), the objection generally must be contemporaneous with the introduction of the objectionable evidence: that is, it must be made "when the evidence is about to be introduced at trial," see United States v. Sides, 944 F.2d 1554, 1560 (10th Cir. 1991) (quoting Wilson v. Waggener, 837 F.2d 220, 222 (5th Cir. 1988)), cert. denied, 502 U.S. 989, or at least immediately thereafter in the form of a motion to strike. To wait until the conclusion of trial to make such an objection, after all the evidence has been introduced, generally constitutes a waiver of that objection for purposes of Rule 103(a)(1).

There are two exceptions to this rule that potentially apply to the instant case. First, some courts have applied an exception "when evidence apparently admissible when offered is shown by subsequent developments to be inadmissible." Metcalf v. United States, 195 F.2d 213, 217 (6th Cir. 1952). In such cases, the objection may be made in the form of a request for an instruction that its effect be limited or that it be withdrawn from the consideration of the jury. Id. In their Reply Brief, Plaintiffs simply cite this exception and state, "It is Plaintiffs' recollection that the subjects of TLV's, general state of the art, and exposure to other companies [sic] products was discussed at the instruction conference with the Court, and such requests by Plaintiffs were made." (Plaint. Reply Br. at 2.) Plaintiffs make no showing that their otherwise untimely objections should be deemed timely because "subsequent developments" revealed that the evidence was inadmissible. Therefore, Plaintiffs cannot use this

exception to preserve error.

A second exception applies to an objection first made in a pretrial motion *in limine*. Plaintiffs filed a pretrial motion *in limine* to exclude evidence of exposure to other companies' products, the subject of Plaintiffs' fourth ground for its present motion. The Tenth Circuit has held that a pretrial motion *in limine* may preserve an objection when the issue (1) is adequately presented to the court, (2) is the type of issue that can be finally decided in a pretrial hearing, and (3) is ruled upon without equivocation by the trial judge. United States v. Mejia-Alarcon, 995 F.2d 982, 986 (10th Cir. 1993), cert. denied, 114 S. Ct. 334.

In the instant case, the Court finds, as to the first prong, Plaintiffs' counsel adequately briefed and argued the issue of whether evidence of exposure to other companies' products should be admitted. In regards to the second prong, however, there remained various factual issues that were "dependent upon the character of the evidence introduced at trial." See id. at 987. Specifically, the Court identified at pretrial several facts or circumstances that could render particular exposure evidence inadmissible: its type, the amount, whether plaintiff was exposed to a degree greater than the general population, and whether the evidence was more prejudicial than probative. Thus, while the Court denied Plaintiffs' motion *in limine* at pretrial, the Court indicated that it would continue to monitor evidence when proffered at trial for potential relevancy and prejudice problems. Therefore, Plaintiffs'

motion *in limine* fails the second prong, as the issue could not be finally decided at pretrial. Similarly, Plaintiffs' motion *in limine* does not satisfy the third prong: the Court did not rule on the motion without equivocation. Rather, the Court indicated that its ruling was not final and determinative, but subject to modification depending on the type of evidence proffered at trial. Despite the Court's indication that it would be willing to entertain objections at trial concerning this evidence, Plaintiffs made no contemporaneous objections. Rather, they waited until the conclusion of trial to attempt to address the matter through a jury instruction. Consequently, Plaintiffs' attorneys deprived the Court of the opportunity to address in a precise manner particular relevancy and prejudice problems when they arose at trial and now ask the Court to rectify their error through the blunt instrument of granting a judgment as a matter of law or new trial. The Court declines their invitation and holds that Plaintiffs waived their objections on grounds two, three, and four.

II.

The Court now takes up Plaintiffs first ground for entering judgment as a matter of law,[1] or alternatively for a new trial: that the verdict was against the great weight of the evidence.

---

[1] The terminology used in Plaintiffs' motion and brief, "judgment notwithstanding the verdict," was replaced by amendment to Rule 50 in 1991 with "judgment as a matter of law"; however, the applicable legal standards are identical to those utilized with the former rule. 9A Charles A. Wright & Arthur R. Miller, Federal Practice and Procedure §2521 at 242-43 & n.13.

A. Motion for Judgment as a Matter of Law

Federal Rule of Civil Procedure 50(b) provides in pertinent part:

> Whenever a motion for a judgment as a matter of law made at the close of all the evidence is denied or for any reason is not granted . . . . [s]uch a motion may be renewed by service and filing not later than 10 days after entry of judgment.

While it appears from the record that Plaintiff's never made such a formal motion at the close of evidence, the Tenth Circuit has adopted a liberal view of what constitutes a motion for a judgment as a matter of law for the purpose of permitting a later motion. See Trujillo v. Goodman, 825 F.2d 1453, 1456 (10th Cir. 1987). In light of the Tenth Circuit's liberal standard and the fact that Defendant has not challenged Plaintiffs' motion on this ground, the Court examines the merits of Plaintiffs' motion.

"A judgment as a matter of law rendered after a verdict has been entered is appropriate only when reasonable minds could not possibly differ as to an issue's necessary outcome." Richter v. Limax International, 45 F.3d 1464, 1470 (10th Cir. 1995). When, as here, the party with the burden of proof moves for a judgment as a matter of law, the test is strict. Hurd v. American Hoist & Derrick Co., 734 F.2d 495, 499 (10th Cir. 1984) (ruling on motion for a directed verdict, which is considered under the same standard as a judgment as a matter of law). A judgment as a matter of law for the party having the burden of proof may be granted only where he has established his case by evidence that the jury would not be at liberty to disbelieve. Id. (citing Service Auto Supply Co. v. Harte & Co., 533 F.2d 23, 25 (1st Cir. 1976)). A judgment as a matter of law for the party bearing the burden of proof may be

granted only if the evidence is such that without weighing the credibility of the witnesses the only reasonable conclusion is in his favor. Id.

The Court holds that in the instant case the record does not establish and Plaintiffs have not shown in their post-trial brief that the evidence presented at trial did not support a rational verdict in favor of Defendant. The jury was entitled to rely upon the testimony of Defendant's expert, Dr. John Craighead, that Mr. Miller's lung cancer was caused by cigarette smoking. Plaintiffs have not satisfied the strict test for obtaining a judgment as a matter of law.

B. Motion for a New Trial

The Federal Rules provide, "A motion for new trial under Rule 59 may be joined with a renewal of the motion for judgment as a matter of law, or a new trial may be requested in the alternative." Fed.R.Civ.P. 50(b). Plaintiffs take the latter route. As a general matter, the ground for a new trial is that the verdict is against the weight of the evidence. See Byrd v. Blue Ridge Rural Elec. Co-op., 78 S.Ct. 893, 902 (1958). The Tenth Circuit has explained,

> In ruling on a motion for a new trial, the trial judge has broad discretion. He has the obligation or duty to ensure that justice is done, and, when justice so requires, he has the authority to set aside the jury's verdict. He may do so when he believes the verdict to be against the weight of the evidence or when prejudicial error has entered the record.

McHargue v. Stokes Div. Of Pennwalt Corp., 912 F.2d 394, 396 (10th Cir. 1990) (citations omitted). The power to grant a new trial on

the ground that the verdict is contrary to the weight of the evidence is invoked only in exceptional cases in which the evidence preponderates heavily against the verdict. United States v. Evans, 42 F.3d 586, 593-94 (10th Cir. 1994).

The Court finds that in the instant case, the evidence did not preponderate heavily against the verdict. Again, in reaching their verdict, the jury was entitled to rely upon the testimony of Defendant's expert that Mr. Miller's lung cancer was caused by cigarette smoking, not Defendant's product. A defendant's verdict based on a finding that Plaintiffs had not proved causation of Mr. Miller's lung cancer by preponderance of the evidence was not against the weight of the evidence. The Court finds that there was no miscarriage of justice in the jury's verdict in favor of Defendant.

III.

For the reasons discussed herein, Plaintiffs' motion for a judgment as a matter of law and motion for a new trial are DENIED.

IT IS SO ORDERED THIS 6 DAY OF MARCH, 1996.

TERRY C. KERN
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA,

Plaintiff,

vs.

ANNA MAE HOGARD aka Ann Mulvehill; QUAD STATES FINANCIAL SERVICES; COUNTY TREASURER, Ottawa County, Oklahoma; BOARD OF COUNTY COMMISSIONERS, Ottawa County, Oklahoma,

Defendants.

Civil Case No. 95 C 1175K

CLERK'S ENTRY OF DEFAULT

It appearing from the files and records of this Court as of March 7, 1996 and the declaration of Loretta F. Radford, Assistant United States Attorney, that the Defendants, **Anna Mae Hogard aka Ann Mulvehill Hogard, County Treasurer and Board of County Commissioners, Ottawa County, Oklahoma**, against whom judgment for affirmative relief is sought in this action have failed to plead or otherwise defend as provided by the Federal Rules of Civil Procedure; now, therefore,

I, RICHARD M. LAWRENCE, Clerk of said Court, pursuant to the requirements of Rule 55(a) of said rules, do hereby enter the default of said defendants.

Dated at Tulsa, Oklahoma, this 7 day of March, 1996.

RICHARD M. LAWRENCE, Clerk
United States District Court for
the Northern District of Oklahoma
by Mark C. McCartt Acting Clerk

By L. Adamski
Deputy

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA)
)
VS.)
)
LORI ANN LITTLE; ROUSSEAU MORTGAGE CORPORATION; CITY OF BROKEN ARROW, Oklahoma; COUNTY TREASURER, Tulsa County, Oklahoma; BOARD OF COUNTY COMMISSIONERS, Tulsa County, Oklahoma) Civil Case No. 96 C 0074K

DISMISSAL STIPULATION

It is agreed and ordered that Rousseau Mortgage Corporation is hereby dismissed from the above entitled matter.

Loretta F. Radford

Attorney for Plaintiff,
Loretta F. Radford, OBA #11158
Assistant United States Attorney
333 W. 4th St., Ste. 3460
Tulsa, OK 74103

D. Ann Kelley

Attorney for Defendant,
D. Ann Kelley, SBOT #11199800
Rousseau Mortgage Corporation
13111 Northwest Freeway
Houston, Texas 77040-6311
(713) 895-6612

CERTIFICATION

I hereby certify that on this 4th day of March, 1996, I mailed a true copy of the within to:

Loretta F. Radford, OBA #11158
Assistant United States Attorney
333 W. 4th St., Ste. 3460
Tulsa, OK 74103
(918) 581-7463

Donna Runnels

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

TIMOTHY LEE GRAVES,)
)
Petitioner,)
)
v.) No. 95-C-284-H
)
MICHAEL W. CARR,)
)
Respondent.)

REPORT AND RECOMMENDATION

Petitioner, Timothy Lee Graves, filed a petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254 on March 28, 1995. Petitioner, currently confined in the Oklahoma Department of Corrections at Lexington, Oklahoma,[1] challenges pro se the judgment and sentence for First Degree Murder in Creek County District Court, entered in Case No. CRF-79-53. By minute order dated March 28, 1995, the District Court referred the petition for a writ of habeas corpus for Report and Recommendation. For the reasons discussed below, the United States Magistrate Judge recommends that the petition for a writ of habeas corpus should be **DENIED.**

I. PROCEDURAL BACKGROUND

Petitioner was convicted of First Degree Murder on June 29, 1979, and sentenced to a term of life imprisonment.[2] On direct appeal, Petitioner argued that

---

[1] By Letter to the Clerk of the Court dated January 22, 1996, and received January 24, 1996, Petitioner informed the court of his change of address to Lexington, Oklahoma.

[2] The Oklahoma Court of Criminal Appeals summarized the facts as follows. "The (continued...)

the evidence was insufficient to support the jury verdict, that Petitioner's oral admissions to the police officers were obtained in violation of his right to counsel, that Petitioner's motion for a mistrial was improperly denied, and that the prosecutor asked improper questions during the opening and closing arguments at trial. The Oklahoma Court of Criminal Appeals affirmed Petitioner's conviction on July 27, 1981. [Doc. No. 1-1, Brief in Support of Petition for Writ of Habeas Corpus, Exhibit A]. A Petition for Rehearing was denied by the Oklahoma Court of Criminal Appeals on August 31, 1981. [Doc. No. 1-1, Brief in Support of Petition for Writ of Habeas Corpus, Exhibit C].

In his first application for post-conviction relief, Petitioner argued that his trial counsel was ineffective because he failed to properly object to questions asked by the prosecution and because he improperly managed the trial. [Doc. No. 4-1, Response to Petition for Writ of Habeas Corpus, Exhibit E]. The district court denied Petitioner's application, and the Oklahoma Court of Criminal Appeals affirmed on May 9, 1986.

---

[2](...continued)
undisputed evidence at trial was that on the morning of the homicide, the defendant received a telephone call from Faye Duncan, who stated that her ex-husband, Mike Duncan, the deceased, would be coming to her trailer home later that morning with the couple's young son. Mrs. Duncan had been assaulted by the deceased the previous evening and was disturbed about Duncan's return. The defendant went to the woman's residence with a shotgun, parked his car so it could not be seen, and secreted himself inside the trailer. Afterwards, Duncan and the boy arrived by automobile and Mrs. Duncan went outside to meet them. Some time passed while the couple visited outdoors and the boy enjoyed the swing set. Thereafter, Mike Duncan approached the door of the trailer. The door opened and Duncan was shot three times, the third time as he lay wounded on the ground. The body was then loaded into the trunk of the deceased's car and was transported to and dumped at an oil lease. At trial the defendant testified that he shot the deceased in self-defense out of fear for himself and Faye Duncan." Graves v. Oklahoma, No. F-79-658 (Okla. Ct. Crim. App. July 27, 1981).

[Doc. No. 1-1, Brief in Support of Petition for Writ of Habeas Corpus, Exhibit E]. The Court considered the test outlined by the Supreme Court in Strickland v. Washington, 466 U.S. 668 (1984), and concluded that "[c]onsidering that appellant shot the decedent three times with a shotgun at close range, with the third shot being fired with [sic] the decedent was lying on the ground, there appears little probability that the outcome of this trial would have been any different." [Doc. No. 1-1, Brief in Support of Petition for Writ of Habeas Corpus, Exhibit E].

On July 19, 1994, Petitioner filed a second application for post-conviction relief. [Doc. No. 4-1, Response to Petition for Writ of Habeas Corpus, Exhibit G]. Petitioner asserted that the jury was not properly instructed on the elements and standard of proof of First Degree Murder, that his trial and direct appeal counsel was ineffective, that the jury was improperly informed of Petitioner's parole possibilities during their deliberation, and that his counsel failed to inform him of a twenty-five year plea bargain offer. [Doc. No. 4-1, Response to Petition for Writ of Habeas Corpus, Exhibit G]. The district court denied relief and the Oklahoma Court of Criminal Appeals affirmed. [Doc. No. 4-1, Response to Petition for Writ of Habeas Corpus, Exhibit F]. The Court of Criminal Appeals found that Petitioner failed to establish why the issues in his second application for relief were not presented in either his first application or his direct appeal, and that consequently, the arguments were waived. [Doc. No. 4-1, Response to Petition for Writ of Habeas Corpus, Exhibit F].

Petitioner filed this Petition for Writ of Habeas Corpus on March 28, 1995. Petitioner alleges (1) that Petitioner's confession was procured in violation of his right to counsel, (2) that Petitioner was deprived of effective assistance of counsel during his trial and subsequent appeal, and that counsel failed to advise him of an offered plea bargain, (3) that the jury was not properly instructed concerning the elements of First Degree Murder, and (4) that the jury improperly considered Petitioner's possibility of parole while deliberating as to Petitioner's guilt or innocence. Respondent argues that Petitioner's third and fourth grounds for relief are procedurally barred because Petitioner failed to raise these issues in his direct appeal or in his first application for post-conviction relief. Respondent further asserts that the admission of Petitioner's confession did not result in reversible error and that Petitioner did not demonstrate that he was deprived of the effective assistance of counsel.

II. ANALYSIS

As a preliminary matter, a court must determine whether a Petitioner meets the exhaustion requirements of 28 U.S.C. § 2254(b) and (c). See Rose v. Lundy, 455 U.S. 509, 510 (1982). Exhaustion of a federal claim may be accomplished by establishing that either (a) the state's appellate court had an opportunity to rule on the same claim presented in federal court, or (b) the petitioner had no available means for pursuing a review of a conviction in state court at the time of the filing of the federal petition. White v. Meachum, 838 F.2d 1137, 1138 (10th Cir. 1988); see also Wallace v. Duckworth, 778 F.2d 1215, 1219 (7th Cir. 1985); Davis v. Wyrick, 766 F.2d 1197, 1204 (8th Cir. 1985), cert. denied, 475 U.S. 1020 (1986). As outlined

above, each of the claims presented by Petitioner have been previously submitted to and decided upon by the Oklahoma Court of Criminal Appeals. The court finds that the Petitioner meets the exhaustion requirements.

The granting of an evidentiary hearing is discretionary with the court. Because the issues raised by Petitioner can be resolved on the basis of the record, the court declines to hold an evidentiary hearing. See Townsend v. Sain, 372 U.S. 293, 318 (1963), overruled in part by Keeney v. Tamayo-Reyes, 504 U.S. 1 (1992).

PROCEDURAL BAR

In this case, Respondent argues that Petitioner's arguments that the jury instruction on First Degree Murder was improper, that Petitioner's counsel failed to inform him of a twenty-five year plea bargain offer, and that the jury improperly discussed the possibility of parole during their deliberations as to Petitioner's guilt or innocence are procedurally barred. Respondent asserts that because Petitioner failed to raise these issues until his second post-conviction petition, Petitioner is prohibited from raising them in this court.

The doctrine of procedural default prohibits a federal court from considering a specific habeas claim where the highest court of the state declined to reach the merits of that claim on independent and adequate state procedural grounds, unless a petitioner "demonstrate[s] cause for the default and actual prejudice as a result of the alleged violation of federal law, or demonstrate[s] that failure to consider the claim[] will result in a fundamental miscarriage of justice." Coleman v. Thompson, 501 U.S. 722, 111 S. Ct. 2546, 2565 (1991); see also Maes v. Thomas, 46 F.3d

979, 985 (10th Cir.), cert. denied, 115 S. Ct. 1972 (1995); Gilbert v. Scott, 941 F.2d 1065, 1067-68 (10th Cir. 1991).

"A state court finding of procedural default is independent if it is separate and distinct from federal law." Maes, 46 F.3d at 985. Additionally, a finding of procedural default is an adequate state ground if it has been applied evenhandedly "`in the vast majority of cases.'" Id. at 986 (quoting Andrews v. Deland, 943 F.2d 1162, 1190 (10th Cir. 1991), cert. denied, 502 U.S. 1110 (1992)).

The Oklahoma Court of Criminal Appeals declined to address Petitioner's arguments that the jury was not properly instructed, that Petitioner was not informed of a plea bargain and that consideration of parole improperly influenced the jury because Petitioner provided no reason as to "why these issues could not have been raised on direct appeal or in his first post-conviction application. As such, these arguments have been waived." [Doc. No. 4-1, Response to Petition for Writ of Habeas Corpus, Exhibit F, Order of Court of Criminal Appeals of the State of Oklahoma, September 16, 1994]. The state court's treatment of these issues, and Petitioner's failure to raise these issues on either his direct appeal or in his first post-conviction petition effectively serves as a procedural bar.

The state court's refusal to address these issues is an "independent" state ground because "it was the exclusive basis for the state court's holding." Maes, 46 F.3d at 985. Additionally, the procedural bar was an "adequate" state ground because the Oklahoma Court of Criminal Appeals has consistently declined to review claims which were not raised in the district court and/or not briefed on appeal. See

Rule 5.2(A) of the Rules of the Court of Criminal Appeals ("The appeal to this Court under the Post-conviction Procedure Act constitutes an appeal from the issues raised, the record, and findings of fact and conclusions of law made in the district court."); Cooper v. State, 889 P.2d 293, 314 (Okla. Ct. Crim. App. 1995) (dismissing claim for failure to properly file supporting citations and authority), cert. granted by 116 S. Ct. 282 (No. 95-5207). Therefore, Petitioner procedurally defaulted these claims before the Oklahoma Court of Criminal Appeals.

Because of his procedural default, this court may not consider Petitioner's claim unless Petitioner is able to show cause and prejudice for the default, or demonstrate that a fundamental miscarriage of justice would result if his claim is not considered. See Coleman, 501 U.S. 722, 749-50. The cause standard requires a petitioner to "show that some objective factor external to the defense impeded . . . efforts to comply with the state procedural rules." Murray v. Carrier, 477 U.S. 478, 488 (1986). Examples of such external factors include the discovery of new evidence, a change in the law, and interference by state officials. Id. A petitioner is additionally required to establish prejudice, which requires showing "`actual prejudice' resulting from the errors of which he complains." United States v. Frady, 456 U.S. 152, 168 (1982). The alternative is proof of a "fundamental miscarriage of justice," which requires a petitioner to demonstrate that he is "actually innocent" of the crime of which he was convicted. McCleskey v. Zant, 499 U.S. 467, 494 (1991).

Improper Jury Instruction

Petitioner alleges that his assertion that the trial court gave an improper jury instruction meets the "cause and prejudice" standard because: (1) Petitioner's arguments are based upon new authority, (2) Petitioner was deprived of effective assistance of counsel, and (3) the improper jury instruction is a "bedrock procedural element" which vitiates fairness.

Petitioner asserts that the jury instruction was improper because it contained the phrase "reasonable moral certainty," and this phrase should not have been included in the instruction. Petitioner bases his argument on a 1973 Oklahoma Supreme Court case Fellows v. State, 508 P.2d 1089 (Okla. 1973). Fellows does support Petitioner's argument. However, since Fellows was decided in 1973, Petitioner could have presented this argument during his direct appeal or on his first post-conviction application. Petitioner has asserted no reason for his failure to present this argument prior to his second post-conviction application, and consequently cannot overcome the "cause" hurdle. Petitioner's assertion that a later case (i.e., a case decided after his first post-conviction application) also recognizes Petitioner's argument (the United States Supreme Court decisions referenced by Petitioner) does not satisfy the cause requirement where the case law, at the time Petitioner filed his direct appeal and first post-conviction application was adequate to support the argument he urges now. See, e.g., Smith v. Murray, 477 U.S. 527, 536 (1986) ("[T]he question is not whether subsequent legal developments have made

counsel's task easier, but whether at the time of the default the claim was `available' at all.").

Petitioner additionally asserts that the jury instruction was improper because the instruction substituted the words "premeditated design" for "unlawful." Again, as noted above, the cases upon which Petitioner relies upon for his argument were decided prior to Petitioner's first post-conviction application. Consequently, Petitioner cannot establish the "cause" requirement. Regardless, even if Petitioner could establish "cause," Petitioner's argument would still fail because he cannot establish actual prejudice from the substitution of the words "premeditated design" for "unlawful."

Petitioner additionally argues that his failure to assert the error relating to jury instruction is due to ineffective assistance of counsel. Whether ineffective assistance of counsel is sufficient to constitute cause is measured by the standard announced in Strickland v. Washington, 466 U.S. 668 (1984).

> [T]he question of cause for a procedural default does not turn on whether counsel erred or on the kind of error counsel may have made. So long as a defendant is represented by counsel whose performance is not constitutionally ineffective under the standard established in Strickland v. Washington, supra, we discern no inequity in requiring him to bear the risk of attorney error that results in procedural default. Instead, we think that the existence of cause for a procedural default must ordinarily turn on whether the prisoner can show that some objective factor external to the defense impeded counsel's efforts to comply with the State's procedural rule.

Murray v. Carrier, 477 U.S. 478, 488 (1986). Petitioner's ineffective assistance of counsel argument is discussed in greater detail below. In brief, Petitioner fails to establish that his counsel's "ineffectiveness" rose to the level required by Strickland. Regardless, even if Petitioner could establish that counsel's conduct fell below the level required by Strickland, Petitioner has not established that he was prejudiced.

Petitioner's final argument with respect to the given jury instruction is that because the jury instruction is such a "bedrock procedural element," the trial court's failure to properly instruct the jury "vitiated fundamental fairness." A habeas corpus petitioner "bears a `great burden . . . when [he] seeks to collaterally attack a state court judgment based on an erroneous jury instruction.'" Lujan v. Tansy, 2 F.3d 1031, 1035 (10th Cir. 1993) (quoting Hunter v. New Mexico, 916 F.2d 595, 598 (10th Cir. 1990), cert. denied, 500 U.S. 909 (1991)), cert. denied, 114 S. Ct. 1074 (1994). Federal habeas corpus relief is not available for alleged errors of state law, and this Court examines only "`whether the ailing instruction by itself so infected the entire trial that the resulting conviction violates due process.'" Estelle v. McGuire, 502 U.S. 62, 72, 112 S. Ct. 475, 482 (1991) (quoting Cupp v. Naughten, 414 U.S. 141, 147 (1973)). Moreover, it is well established that "`[h]abeas proceedings may not be used to set aside a state conviction on the basis of erroneous jury instructions unless the errors had the effect of rendering the trial so fundamentally unfair as to cause a denial of a fair trial in the constitutional sense.'" Shafer v. Stratton, 906 F.2d 506, 508 (10th Cir. 1990) (quoting Brinlee v. Crisp, 608 F.2d 839, 854 (10th

Cir. 1979), cert. denied, 444 U.S. 1047 (1980)), cert. denied, 498 U.S. 961 (1990). Petitioner has not met this burden.

Failure to Advise of Plea-Bargain

Respondent argues that because Petitioner failed to assert the failure of his counsel to advise him of a plea bargain until his second post-conviction application, Petitioner has waived his right to assert the argument. The Oklahoma Court of Criminal Appeals, in its Order denying Petitioner's second post-conviction application noted that Plaintiff "provides no reason why these issues [counsel's failure to advise him of a twenty-five year plea bargain offer] could not have been raised on direct appeal or in his first post-conviction application. As such, these arguments have been waived." [Doc. No. 4-1, Response to Petition for Writ of Habeas Corpus, Exhibit F, Order dated Sept. 16, 1994].

Petitioner acknowledges that this argument was not raised in his direct appeal (since trial counsel served as his direct appeal counsel). Petitioner asserts, however, that this argument is not procedurally barred because it was raised in his first post-conviction application.

Petitioner's first post-conviction application, although requesting relief based on ineffective assistance of counsel, makes no mention of the failure of counsel to advise Petitioner of an offer of plea bargain. Petitioner states that "[proof] that this issue was first raised in Petitioner's first post conviction relief application can be seen in the 6th day of June, 1985, evidentiary hearing transcript, at pages 41-47." [Reply to Respondent's Response to Petition for Writ of Habeas Corpus at 13]. However,

the hearing referred to by Petitioner was before the trial court. Petitioner does not assert or maintain that this argument was made in his brief or in his petition in error to the Oklahoma Court of Criminal Appeals. And a review of Petitioner's appeal, following his first application for post-conviction relief, indicates that it was not. [Doc. No. 4-1, Response to Petition for Writ of Habeas Corpus, Exhibit E, Brief of Appellant filed July 3, 1985.]

The mere mention in an evidentiary hearing before the trial court is insufficient to "preserve" the argument for presentation to a state appellate court. See Rules of the Oklahoma Court of Criminal Appeals, Rules 3.5(A)(5) & 5.2(A). Petitioner's failure to include this argument in his brief resulted in a waiver of the argument, and such a waiver acts as a procedural bar to a federal review of this claim.

CONSIDERATION BY JURY OF POSSIBILITY OF PAROLE

Petitioner alleges that the jury improperly considered the possibility of parole while deliberating his guilt or innocence. Petitioner alleges that although he failed to present this argument until his second post-conviction application, he meets the cause and prejudice standard because he failed to discover the jury's "consideration" of parole until 1990. Even if Petitioner could show adequate cause to excuse his default, he has not show prejudice. See Mabry v. Johnson, 467 U.S. 504, 505 (1984). However, because the issue urged by Petitioner does not establish a violation of the Federal Constitution, Petitioner's request for habeas relief is improper.

Petitioner "can obtain federal habeas corpus relief only if his custody is in violation of the Federal Constitution." Mabry v. Johnson, 467 U.S. 504, 505 (1984).

See also Townsend v. Sain, 372 U.S. 293, 312 (1963); 28 U.S.C. § 2254(a). Petitioner's assertion that the jury considered the possibility of parole during the deliberation of his guilt or innocence does not allege a violation of the federal constitution.

In Monroe v. Collins, 951 F.2d 49, 52 (5th Cir. 1992), the court determined that the juror's consideration of parole, although violative of state law, did not offend the federal constitutional rights of the defendant.

> Because it is not repugnant to the federal constitution for a state to accurately[3] instruct the jury on parole procedures, it follows that a state trial juror's accurate comments about parole law do not offend the federal constitutional rights of the defendant.

Id. at 52. Monroe was based, in part, by the Supreme Court's decision in California v. Ramos, 463 U.S. 992 (1983). In Ramos, the Supreme Court indicated that the consideration by a jury of executive clemency powers does not render a trial fundamentally unfair under the federal constitution.

---

[3] Petitioner does not assert that the jury considered inaccurate information. Petitioner asserts only that information concerning parole was considered by the jury. Petitioner asserts this argument based on a "letter" which he does not provide for the court's review. Petitioner states that the letter was written by a member of the jury to the pardon and parole board, and that the letter indicates that the jury was not comfortable finding Petitioner guilty of murder until the jury was informed of the possibility that Petitioner could be paroled.

Oklahoma's first degree murder statute provided, at the time Petitioner was sentenced in 1979, that the punishment for murder was death or imprisonment for life. Oklahoma did not enact a "life without parole" option until 1987. See 21 O.S. § 701.9. Petitioner was sentenced to "life." See State Court Records, submitted by Respondent, May 1, 1995, at 648. Oklahoma's parole statutes provide for consideration of parole upon completion of one-third of a sentence. 57 O.S. 1991, § 332.7.

> We do not suggest that there would be any federal constitutional infirmity in giving an instruction concerning the Governor's power to commute the death sentence. We note only that such comment is prohibited under state law . . . . Surely, the respondent cannot argue that the Constitution prohibits the State from accurately characterizing its sentencing choices.
> * * *
> We sit as judges, not as legislators, and the wisdom of the decision to permit juror consideration of possible commutation is best left to the States. We hold only that the Eighth and Fourteenth Amendments do not prohibit such an instruction.

Id. at 3455 n.19.

The court concludes that the consideration by a jury of the possibility of parole does not raise a federal constitutional issue.

CONFESSION OF PETITIONER AND RIGHT TO COUNSEL

Petitioner asserts that the trial court improperly admitted his confession because the confession was obtained in violation of Edwards v. Arizona, 451 U.S. 477 (1981). Petitioner asserts only that the confession was improperly admitted and makes no argument as to what effect this alleged error had on the jury's decision.

In Arizona v. Fulminante, 499 U.S. 279, 306-10 (1991), the Supreme Court addressed the admission by a trial court of a confession obtained in violation of Edwards. The Court determined that the admission of the confession constituted "trial error," and as such was subject to the "harmless error" analysis.

> It is evident from a comparison of the constitutional violations which we have held subject to harmless error, and those which we have held not, that involuntary statements or confessions belong in the former category. The admission of an involuntary confession is a "trial

> error," similar in both degree and kind to the erroneous admission of other types of evidence. The evidentiary impact of an involuntary confession, and its effect upon the composition of the record, is indistinguishable from that of a confession obtained in violation of the Sixth Amendment--or evidence seized in violation of the Fourth Amendment--or of a prosecutor's improper comment on a defendant's silence at trial in violation of the Fifth Amendment. When reviewing the erroneous admission of an involuntary confession, the appellate court, as it does with the admission of other forms of improperly admitted evidence simply reviews the remainder of the evidence against the defendant to determine whether the admission of the confession was harmless beyond a reasonable doubt.

Id. at 279.

The present standard in determining whether trial error is harmless in federal habeas corpus cases was articulated in Brecht v. Abrahamson, 113 U.S. 619, 113 S. Ct. 1710 (1992), and further clarified in O'Neal v. McAninch, ___ U.S. ___, 115 S. Ct. 992, 995 (1995). Before the Court's decision in Brecht, the same "harmless error" standard applied in both direct appeals and federal habeas corpus cases. That standard was established by the Court in Chapman v. California, 386 U.S. 18 (1967), and required that for a conviction tainted by a constitutional trial error to be upheld, the prosecution must demonstrate "beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." Id. at 24. In Brecht, the Court held that the Chapman standard, although remaining applicable to errors reviewed on direct appeals, no longer applied in federal habeas corpus cases.[4] The

---

[4] The Eighth Circuit, in determining the applicable standard following the Court's decision (continued...)

Court, instead, adopted the standard previously established in Kotteakos v. United States, 328 U.S. 750 (1946).

> The imbalance of the costs and benefits of applying the Chapman harmless-error standard on collateral review counsels in favor of applying a less onerous standard on habeas review of constitutional error. The Kotteakos standard, we believe, fills the bill. The test under Kotteakos is whether the error "had substantial and injurious effect or influence in determining the jury's verdict." Under this standard, habeas petitioners may obtain plenary review of their constitutional claims, but they are not entitled to habeas relief based on trial error unless they can establish that it resulted in "actual prejudice."

Brecht, 113 S. Ct. at 1721 (citations omitted). In determining whether error is harmless, Kotteakos emphasized that the issue is not whether the jury was correct in its ultimate judgment as to guilt or innocence.

> [The issue is] what effect the error had or reasonably may be taken to have had upon the jury's decision. The crucial thing is the impact of the thing done wrong on the minds of other men, not on one's own, in the total setting. This must take account of what the error meant to them, not singled out and standing alone, but in relation to all else that happened.

Kotteakos, 328 U.S. 750, 763 (citations omitted).

---

[4](...continued)
in Brecht, concluded that in some circumstances the Chapman standard should be applied. See e.g. Orndorff v. Lockhart, 998 F.2d 1426, 1429-30. The Fourth, Seventh, and Eleventh Circuits have determined that Brecht requires a federal court to apply the Kotteakos standard. See e.g. Smith v. Dixon, 14 F.3d 956, 979-80 (4th Cir. 1994); Tyson v. Trigg, 50 F.3d 436, 446-47 (7th Cir. 1995); Horsley v. Alabama, 45 F.3d 1486, 1492 & n.11. The Tenth Circuit has not yet addressed this issue. However, the concerns addressed by the Eighth Circuit are not present in this case because the state appellate court initially reviewed the issue raised by Petitioner under the Chapman standard. [Doc. 1-1, Brief in Support of Petition for Writ of Habeas Corpus, Exhibit A.]

Upon review of the record as a whole, the court determines that the admission of the confession[5] did not have "substantial and injurious effect or influence in determining the jury's verdict." The premise of Petitioner's case was self-defense. Petitioner testified that on the morning of March 7, after a telephone conversation with Faye Duncan he decided to stop by her residence on his way to work. [November 26, 1979 Trial Transcript at 548.] (Previous testimony indicated that on the evening of March 6, Mike Duncan, Faye Duncan's ex-husband, had assaulted her at her residence.) Petitioner stated that the door to Ms. Duncan's residence was "crashed-in" and that Ms. Duncan had a bruise on her leg.

Petitioner testified that he brought a shotgun and some ammunition with him, put it in a closet at Ms. Duncan's place, and told her that she needed it for protection. [November 26, 1979 Trial Transcript at 550]. According to Petitioner, he left to get Ms. Duncan some cigarettes, and when he returned Ms. Duncan told him that Mike Duncan had called and he was on his way over. Petitioner testified that he initially thought he should leave, but then changed his mind because he did not want "to leave a woman defenseless against a maniac." [November 26, 1979 Trial Transcript at 548.] Petitioner testified that he ran into the bedroom and got the shotgun and watched from the window as Ms. Duncan talked to Mr. Duncan. [November 26, 1979 Trial Transcript at 550.] Petitioner stated that Mr. Duncan headed for the front door and he thought "Oh my God, he's going to come in here."

---

[5] Because the court determines that the admission of the confession was "harmless error," the court does not analyze whether the confession was in violation of Edwards.

[November 26, 1979 Trial Transcript at 552.] According to Petitioner he considered hiding in the bathroom but decided not to because "that was a trap if there ever was one." [November 26, 1979 Trial Transcript at 552.] However, Mr. Duncan backed away from the door. As Petitioner watched from the window, he testified that he could tell that Mr. Duncan was "obviously upset. He looked mad, to me. I have seen him mad plenty of times. I knew what he looked like when he was mad. And he looked mad to me." [November 26, 1979 Trial Transcript at 552.] Petitioner believed that Mr. Duncan had a gun, and Petitioner testified that he was "scared to death . . . [and] knew that when he opened that front door that he would shoot me and kill me." [November 26, 1979 Trial Transcript at 553.] Petitioner stated that

> . . . I opened that door when I seen the doorknob turning. I opened the door, and I remember a glimpse of his face. I remember three shots. I remember Faye [Ms. Duncan] crying. That brought me back around. I was crying. Michael [Ms. Duncan's son] was crying. Faye was crying. Mike Duncan was laying by the edge of a car that was parked down there at the time. The shot gun was laying off by me, and I was standing at the foot of the steps. Everybody was--for lack of a better word--everybody was blowing it. You know. Faye was coming into the house. I went in with her; told her to take care of her son. I think. She told me, I think, to cover the body up. I went and got a blanket; and covered the body up. I felt kind of like a zombie, or something. The shock of the whole thing was overwhelming. I went and got my car; drove it back to the house. I loaded the body in the trunk of my car. I took him to the oil lease where they found him. I dropped him off there. I came back to Faye's house. I drove his car to where the officers found it. Faye followed me in my car. After we had dropped off his car, I had stopped at a point not too far from where his car was at and had thrown the shotgun out, and the ammunition; and drove from there to Bixby to wash the trunk of my car out. . . .

[November 26, 1979 Trial Transcript at 554.]

Petitioner acknowledged that he shot the decedent three times with a shotgun. Petitioner's testimony at trial was essentially the same as the "confession" Petitioner claims was wrongly admitted.[6] The differences between the Petitioner's confession[7] to the police officer, and Petitioner's direct testimony are: (1) the officer testified that Petitioner told Ms. Duncan, upon arriving at her residence, that he would blow the decedent away, (2) the officer testified that Petitioner stated he was present when the decedent telephoned Ms. Duncan, and after learning Mr. Duncan was planning to come to the residence, moved his car away from the residence, and (3) the officer testified that Petitioner shot decedent the third time because he believed the decedent was suffering.

---

[6] The testimony of the police officer, who testified at trial as to Petitioner's "confession," was very similar to Petitioner's direct testimony. The police officer testified that Petitioner received a call from Ms. Duncan saying she had been beaten up by Mr. Duncan the previous evening, that Petitioner went to Ms. Duncan's house, taking a twelve-gauge automatic shotgun and shotgun shells from his car and took them into Ms. Duncan's residence. According to the police officer Petitioner informed Ms. Duncan that "he intended to blow Michael away." Petitioner was at Ms. Duncan's house when Ms. Duncan received the phone call from Mr. Duncan. Petitioner left the residence to move his automobile, and then returned to Ms. Duncan's residence. The police officer testified that according to the Petitioner, the Petitioner waited inside the residence while Mr. and Ms. Duncan talked. When Mr. Duncan came to the front door and opened it Petitioner shot him in the left shoulder; as Mr. Duncan staggered, with his back towards Petitioner, Petitioner shot him in the back; after Mr. Duncan fell down, Petitioner apparently believed Mr. Duncan was suffering, so he stationed himself over the body and shot him in the head. [November 26, 1979 Trial Transcript at 102-03.]

[7] At trial, the Petitioner claimed that he could not recall all of the specifics of the shooting, and did not recall saying that he was going to "blow away" the decedent. [November 26, 1979 Trial Transcript at 566, 569.]

Considering the direct testimony of the Petitioner and the state's evidence, Petitioner cannot establish that the admission of the confession "had substantial and injurious effect or influence in determining the jury's verdict" or resulted in "actual prejudice." The court therefore finds that the admission of the testimony was "harmless."

INEFFECTIVE ASSISTANCE OF COUNSEL

To establish ineffective assistance of counsel, Petitioner must show that his counsel's performance was deficient and that the deficient performance prejudiced his defense. Strickland v. Washington, 466 U.S. 668, 687 (1984); Osborn v. Shillinger, 997 F.2d 1324, 1328 (10th Cir. 1993). Petitioner can establish the first prong by showing that counsel performed below the level expected from a reasonably competent attorney in criminal cases. Strickland, 466 U.S. at 687-88.[8] To establish the second prong, Petitioner must show that this deficient performance prejudiced the defense, to the extent that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Id. at 694. See also Lockhart v. Fretwell, 506 U.S. 364, 113 S.Ct. 838, 842-44 (1993)

---

[8] "The proper standard for measuring attorney performance is reasonably effective assistance." Gillette v. Tansy, 17 F.3d 308, 310-311 (10th Cir. 1994) (quoting Laycock v. New Mexico, 880 F.2d 1184, 1187 (10th Cir. 1989)). In doing so, a court must "judge . . . [a] counsel's challenged conduct on the facts of the particular case, viewed as of the time of counsel's conduct." Strickland, at 690. There is a "strong presumption [however,] that counsel's conduct falls within the wide range of reasonable professional assistance." Id. at 695. Moreover, review of counsel's performance must be highly deferential. "[I]t is all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable." Id. at 689.

(counsel's unprofessional errors must cause a trial to be "fundamentally unfair or unreliable").

Petitioner asserts that his trial counsel was ineffective for a number of reasons.[9] After reviewing the record and the arguments asserted by Petitioner, the court is of the opinion that Petitioner's claim is without merit and Petitioner cannot satisfy either prong of the Strickland test.

RECOMMENDATION

The United States Magistrate Judge recommends that the District Court **DENY** the petition for a writ of habeas corpus. Any objection to this Report and Recommendation must be filed with the Clerk of the Courts within ten days of the receipt of this notice. **Failure to file objections within the specified time will result in a waiver of the right to appeal the District Court's order.** See Moore v. United States, 950 F.2d 656 (10th Cir. 1991).

Dated this 6 day of March 1996.

Sam A. Joyner
United States Magistrate Judge

[9] Petitioner asserts that trial counsel was ineffective in: allowing Petitioner to take an unsupervised polygraph exam; failing to request that the matter be remanded for an additional preliminary hearing; requesting running objections; failing to make some objections; failing to follow-up some objections with a motion for mistrial and a motion to admonish the jury to disregard the question; failing to properly invoke the Rule of Sequestration; and failing to object to statements made by the Prosecutor in his closing argument.

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	FILED
	)	
vs.	)	MAR 7 1996
	)	
GARY J. COOPER aka Gary James Cooper; NAOMI M. COOPER aka Naomi Marie Cooper; COUNTY TREASURER, Tulsa County, Oklahoma; BOARD OF COUNTY COMMISSIONERS, Tulsa County, Oklahoma,	)	Richard M. Lawrence, Court Clerk U.S. DISTRICT COURT
	)	ENTERED ON DOCKET
	)	DATE MAR 0 8 1996
Defendants.	)	Civil Case No. 95-C 424C

JUDGMENT OF FORECLOSURE

This matter comes on for consideration this 7 day of March, 1996. The Plaintiff appears by Stephen C. Lewis, United States Attorney for the Northern District of Oklahoma, through Loretta F. Radford, Assistant United States Attorney; the Defendants, COUNTY TREASURER, Tulsa County, Oklahoma, and BOARD OF COUNTY COMMISSIONERS, Tulsa County, Oklahoma, appear by Dick A. Blakeley, Assistant District Attorney, Tulsa County, Oklahoma; and the Defendants, GARY J. COOPER aka Gary James Cooper and NAOMI M. COOPER aka Naomi Marie Cooper, appear not, but make default.

The Court further finds that the Defendants, GARY J. COOPER aka Gary James Cooper and NAOMI M. COOPER aka Naomi Marie Cooper, were served by publishing notice of this action in the Tulsa Daily Commerce & Legal News, a newspaper of general circulation in Tulsa County, Oklahoma, once a week for six (6) consecutive weeks beginning September 18, 1995, and continuing through October 23, 1995, as more fully appears from the verified proof of publication duly filed herein; and that this action is one in

which service by publication is authorized by 12 O.S. Section 2004(c)(3)(c). Counsel for the Plaintiff does not know and with due diligence cannot ascertain the whereabouts of the Defendants, GARY J. COOPER aka Gary James Cooper and NAOMI M. COOPER aka Naomi Marie Cooper, and service cannot be made upon said Defendants within the Northern Judicial District of Oklahoma or the State of Oklahoma by any other method, or upon said Defendants without the Northern Judicial District of Oklahoma or the State of Oklahoma by any other method, as more fully appears from the evidentiary affidavit of a bonded abstracter filed herein with respect to the last known address of the Defendants, GARY J. COOPER aka Gary James Cooper and NAOMI M. COOPER aka Naomi Marie Cooper. The Court conducted an inquiry into the sufficiency of the service by publication to comply with due process of law and based upon the evidence presented together with affidavit and documentary evidence finds that the Plaintiff, United States of America, acting through the Department of Housing and Urban Development, and its attorneys, Stephen C. Lewis, United States Attorney for the Northern District of Oklahoma, through Loretta F. Radford, Assistant United States Attorney, fully exercised due diligence in ascertaining the true name and identity of the parties served by publication with respect to their present or last known place of residence and/or mailing address. The Court accordingly approves and confirms that the service by publication is sufficient to confer jurisdiction upon this Court to enter the relief sought by the Plaintiff, both as to subject matter and the Defendants served by publication.

It appears that the Defendants, COUNTY TREASURER, Tulsa County, Oklahoma, and BOARD OF COUNTY COMMISSIONERS, Tulsa County, Oklahoma, filed their Answers on May 22, 1995; and that the Defendants, GARY J, COOPER aka Gary James

Cooper and NAOMI M. COOPER aka Naomi Marie Cooper, have failed to answer and their default has therefore been entered by the Clerk of this Court.

The Court further finds that the Defendant, GARY J. COOPER, is one and the same person as Gary James Cooper, and will hereinafter be referred to as "GARY J. COOPER." The Defendant, NAOMI M. COOPER, is one and the same person as Naomi Marie Cooper, and will hereinafter be referred to as "NAOMI M. COOPER." The Defendants, GARY J. COOPER and NAOMI M. COOPER, are husband and wife.

The Court further finds that on February 8, 1991, Gary J. Cooper and Naomi M. Cooper filed their voluntary petition in bankruptcy in Chapter 7 in the United States Bankruptcy Court, Northern District of Oklahoma, Case No. 91-00331-C. On May 29, 1991, the United States Bankruptcy Court for the Northern District of Oklahoma filed its Discharge of Debtor and the case was subsequently closed on July 29, 1991.

The Court further finds that this is a suit based upon a certain mortgage note and for foreclosure of a mortgage securing said mortgage note upon the following described real property located in Tulsa County, Oklahoma, within the Northern Judicial District of Oklahoma:

Lot Five (5), Block Eleven (11), DOLLIE-MAC ADDITION, an Addition to the City of Tulsa, Tulsa County, State of Oklahoma, according to the Recorded Plat thereof.

The Court further finds that on November 15, 1989, the Defendants, GARY J. COOPER and NAOMI M. COOPER, executed and delivered to CENTRAL MORTGAGE CORPORATION, their mortgage note in the amount of $37,368.00, payable in monthly installments, with interest thereon at the rate of Ten and One-Half percent (10.5%) per annum.

The Court further finds that as security for the payment of the above-described note, the Defendants, GARY J. COOPER and NAOMI M. COOPER, husband and wife, executed and delivered to CENTRAL MORTGAGE CORPORATION, a mortgage dated November 15, 1989, covering the above-described property. Said mortgage was recorded on November 20, 1989, in Book 5220, Page 1961, in the records of Tulsa County, Oklahoma.

The Court further finds that on November 15, 1989, CENTRAL MORTGAGE CORPORATION, assigned the above-described mortgage note and mortgage to BANK OF MEEKER. This Assignment of Mortgage was recorded on December 5, 1989, in Book 5223, Page 2070, in the records of Tulsa County, Oklahoma.

The Court further finds that on November 15, 1989, BANK OF MEEKER, assigned the above-described mortgage note and mortgage to J.I. KISLAK MORTGAGE SERVICE CORPORATION. This Assignment of Mortgage was recorded on December 8, 1989, in Book 5224, Page 1221, in the records of Tulsa County, Oklahoma.

The Court further finds that on April 17, 1991, J.I. KISLAK MORTGAGE SERVICE CORPORATION, assigned the above-described mortgage note and mortgage to the Secretary of Housing and Urban Development his successors and assigns. This Assignment of Mortgage was recorded on April 18, 1991, in Book 5316, Page 0504, in the records of Tulsa County, Oklahoma.

The Court further finds that on July 1, 1990, the Defendants, GARY J. COOPER and NAOMI M. COOPER, entered into an agreement with the Plaintiff lowering the amount of the monthly installments due under the note in exchange for the Plaintiff's forbearance of its right to foreclose.

The Court further finds that the Defendants, GARY J. COOPER and NAOMI M. COOPER, made default under the terms of the aforesaid note and mortgage, as well as the terms and conditions of the forbearance agreement, by reason of their failure to make the monthly installments due thereon, which default has continued, and that by reason thereof the Defendants, GARY J. COOPER and NAOMI M. COOPER, are indebted to the Plaintiff in the principal sum of $59,634.96, plus interest at the rate of 10.5 percent per annum from March 15, 1995 until judgment, plus interest thereafter at the legal rate until fully paid, and the costs of this action.

The Court further finds that the Defendant, COUNTY TREASURER, Tulsa County, Oklahoma, has a lien on the property which is the subject matter of this action by virtue of personal property taxes in the amount of $20.00 which became a lien on the property as of June 26, 1992, a lien in the amount of $17.00 which became a lien on the property as of June 25, 1993, and a lien in the amount of $17.00 which became a lien on the property as of June 23, 1994. Said liens inferior to the interest of the Plaintiff, United States of America.

The Court further finds that the Defendants, GARY J. COOPER and NAOMI M. COOPER, are in default, and have no right, title or interest in the subject real property.

The Court further finds that the Defendant, BOARD OF COUNTY COMMISSIONERS, Tulsa County, Oklahoma, claims no right, title or interest in the subject real property.

The Court further finds that pursuant to 12 U.S.C. 1710(1) there shall be no right of redemption (including in all instances any right to possession based upon any right of redemption) in the mortgagor or any other person subsequent to the foreclosure sale.

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that the Plaintiff, the United States of America, acting on behalf of the Secretary of Housing and Urban Development, have and recover judgment In Rem against the Defendants, GARY J. COOPER and NAOMI M. COOPER, in the principal sum of $59,634.96, plus interest at the rate of 10.5 percent per annum from March 15, 1995 until judgment, plus interest thereafter at the current legal rate of 5.25 percent per annum until paid, plus the costs of this action, plus any additional sums advanced or to be advanced or expended during this foreclosure action by Plaintiff for taxes, insurance, abstracting, or sums for the preservation of the subject property.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Defendant, COUNTY TREASURER, Tulsa County, Oklahoma, have and recover judgment in the amount of $54.00, plus costs and interest, for personal property taxes for the years 1991, 1992, and 1993, plus the costs of this action.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Defendants, GARY J. COOPER, NAOMI M. COOPER and BOARD OF COUNTY COMMISSIONERS, Tulsa County, Oklahoma, have no right, title, or interest in the subject real property.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that upon the failure of said Defendants, GARY J. COOPER and NAOMI M. COOPER, to satisfy the judgment In Rem of the Plaintiff herein, an Order of Sale shall be issued to the United States Marshal for the Northern District of Oklahoma, commanding him to advertise and sell according to Plaintiff's election with or without appraisement the real property involved herein and apply the proceeds of the sale as follows:

First:

In payment of the costs of this action accrued and accruing incurred by the Plaintiff, including the costs of sale of said real property;

Second:

In payment of the judgment rendered herein in favor of the Plaintiff;

Third:

In payment of Defendant, COUNTY TREASURER, Tulsa County, Oklahoma, in the amount of $54.00, personal property taxes which are currently due and owing.

The surplus from said sale, if any, shall be deposited with the Clerk of the Court to await further Order of the Court.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that pursuant to 12 U.S.C. 1710(1) there shall be no right of redemption (including in all instances any right to possession based upon any right of redemption) in the mortgagor or any other person subsequent to the foreclosure sale.

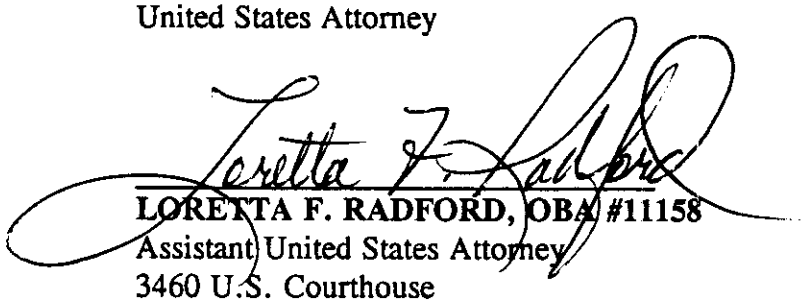
IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that from and after the sale of the above-described real property, under and by virtue of this judgment and decree, all of the Defendants and all persons claiming under them since the filing of the Complaint, be and they are forever barred and foreclosed of any right, title, interest or claim in or to the subject real property or any part thereof.

(Signed) H. Dale Cook

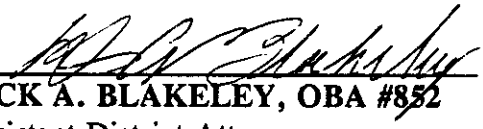
UNITED STATES DISTRICT JUDGE

APPROVED:

STEPHEN C. LEWIS
United States Attorney



LORETTA F. RADFORD, OBA #11158
Assistant United States Attorney
3460 U.S. Courthouse
Tulsa, Oklahoma 74103
(918) 581-7463



DICK A. BLAKELEY, OBA #852
Assistant District Attorney
406 Tulsa County Courthouse
Tulsa, Oklahoma 74103
(918) 596-4842
Attorney for Defendants,
County Treasurer and
Board of County Commissioners,
Tulsa County, Oklahoma

Judgment of Foreclosure
Civil Action No. 95-C 424C

LFR:flv

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

LEC CAPITAL CORPORATION,

Plaintiff,

v.

CAMPBELL DRILLING COMPANY, INC.; BOB E. WALLS; TRUMAN D. HOOVER; BOB L. HAMILTON and BYTHEL CAMPBELL,

Defendants.

No. 89-C-1047-B

ORDER

The joint motion of the parties [Doc. No. 123] to withdraw Plaintiff's Motion to Require Debtor to Select Homestead [Doc. No 108] is sustained. Plaintiff's motion [Doc. No. 108] is ordered withdrawn.

As there are no longer any pending post-judgment motions, this case is ordered closed.

IT IS SO ORDERED.

Dated this 6 day of March 1996.

Sam A. Joyner
United States Magistrate Judge

IN THE UNITED STATES DISTRICT COURT FOR
THE NORTHERN DISTRICT OF OKLAHOMA

DON AUSTIN, an individual, BARBARA WILLIS, an individual, DOROTHY COOKS, an individual, and KAREN SNAP, an individual, and other JOHN DOE or JANE DOE Plaintiffs as they become known,

Plaintiffs,

vs.

SUN REFINING AND MARKETING COMPANY,

Defendant.

Case No. 92-C-258-H

JUDGMENT PURSUANT TO RULE 68

The captioned matter came before the Court this 7th day of March, 1996, for judgment pursuant to Rule 68 of the Federal Rules of Civil Procedure. The Court, having reviewed the Court file and being fully advised in the premises, finds that an Offer to Confess Judgment was made by the Defendant, Sun Refining and Marketing Company, pursuant to Rule 68, Federal Rules of Civil Procedure, in the amount of $3,500.00, and that the offer was timely accepted by the Plaintiff, Joyce Daley, as evidenced by the Affidavit of John Merritt, counsel of record for Plaintiff Joyce Daley, filed of record herein. Based upon these findings and the Court file, judgment should be entered in accordance with the Offer to Confess Judgment.

The parties agree that this offer, acceptance and judgment shall not be used as evidence in the ongoing case, and is binding only between the parties who have reached an agreement under Rule 68 and is in no way binding upon the Defendant or the other parties still litigating this suit.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that the Plaintiff, Joyce Daley, have and recover judgment of and from the Defendant, Sun Refining and Marketing Company, for the total sum of $3,500.00.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that acceptance and judgment shall not be used as evidence in the ongoing case, and is binding only between the parties who have reached an agreement under Rule 68 and is in no way binding upon the Defendant or the other parties still litigating this suit.

DATED this 7th day of MARCH, 1996.

S/ SVEN ERIK HOLMES

UNITED STATES DISTRICT COURT JUDGE

APPROVED BY:

R. V. FUNK, OBA #3182
406 SOUTH BOULDER
SUITE 234
TULSA, OK 74103
(918) 585-8522

ATTORNEY FOR PLAINTIFFS

/s/

BARBARA A. SANGER, OBA #14106
JOHN M. MERRITT, OBA #6146
MICHAEL M. BLUE, OBA #13143
MERRITT & ROONEY, INC.
POST OFFICE BOX 60708
OKLAHOMA CITY, OKLAHOMA 73146
(405) 236-2222
ATTORNEYS FOR PLAINTIFFS

JOHN H. TUCKER, OBA #9110
ROBERT P. REDEMANN, OBA #7454
HAROLD C. ZUCKERMAN, OBA #11189
100 W. 5TH STREET, SUITE 400
TULSA, OKLAHOMA 74103-4287

ATTORNEYS FOR DEFENDANT

c:\word\rpr\185-26\off-con\daley.jud

IN THE UNITED STATES DISTRICT COURT FOR
THE NORTHERN DISTRICT OF OKLAHOMA

DON AUSTIN, an individual, BARBARA WILLIS, an individual, DOROTHY COOKS, an individual, and KAREN SNAP, an individual, and other JOHN DOE or JANE DOE Plaintiffs as they become known,

Plaintiffs,

vs.

SUN REFINING AND MARKETING COMPANY,

Defendant.

Case No. 92-C-258-H

JUDGMENT PURSUANT TO RULE 68

The captioned matter came before the Court this 7th day of MARCH, 1996, for judgment pursuant to Rule 68 of the Federal Rules of Civil Procedure. The Court, having reviewed the Court file and being fully advised in the premises, finds that an Offer to Confess Judgment was made by the Defendant, Sun Refining and Marketing Company, pursuant to Rule 68, Federal Rules of Civil Procedure, in the amount of $1,000.00, and that the offer was timely accepted by the Plaintiff, Shari Gilling, as evidenced by the Affidavit of John Merritt, counsel of record for Plaintiff Shari Gilling, filed of record herein. Based upon these findings and the Court file, judgment should be entered in accordance with the Offer to Confess Judgment.

The parties agree that this offer, acceptance and judgment shall not be used as evidence in the ongoing case, and is binding only between the parties who have reached an agreement under Rule 68 and is in no way binding upon the Defendant or the other parties still litigating this suit.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that the Plaintiff, Shari Gilling, have and recover judgment of and from the Defendant, Sun Refining and Marketing Company, for the total sum of $1,000.00.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that acceptance and judgment shall not be used as evidence in the ongoing case, and is binding only between the parties who have reached an agreement under Rule 68 and is in no way binding upon the Defendant or the other parties still litigating this suit.

DATED this 7th day of MARCH, 1996.

S/ SVEN ERIK HOLMES

UNITED STATES DISTRICT COURT JUDGE

APPROVED BY:

R. V. FUNK, OBA #3182
406 SOUTH BOULDER
SUITE 234
TULSA, OK 74103
(918) 585-8522

ATTORNEY FOR PLAINTIFFS

/s/
BARBARA A. SANGER, OBA #14106
JOHN M. MERRITT, OBA #6146
MICHAEL M. BLUE, OBA #13143
MERRITT & ROONEY, INC.
POST OFFICE BOX 60708
OKLAHOMA CITY, OKLAHOMA 73146
(405) 236-2222
ATTORNEYS FOR PLAINTIFFS

JOHN H. TUCKER, OBA #9110
ROBERT P. REDEMANN, OBA #7454
HAROLD C. ZUCKERMAN, OBA #11189
100 W. 5TH STREET, SUITE 400
TULSA, OKLAHOMA 74103-4287

ATTORNEYS FOR DEFENDANT

c:\word\rpr\185-26\off-con\sgilling.jud

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

LARRY J. CARTER,)
)
Plaintiff,)
)
vs.) No. 96-CV-50-B
)
TULSA COUNTY, et al.,)
)
Defendants.)

ORDER

On January 29, 1996, the Clerk of this Court notified Plaintiff that he had not submitted summons and Marshal forms for service on Defendants and that he should do so within twenty days. The Clerk mailed Plaintiff the requisite forms and instructions on how to complete and sign them. As of the date of this order, Plaintiff has failed to submit the above mentioned forms or seek an extension of time.

Accordingly, Plaintiff's motion for leave to proceed in forma pauperis (docket #2) is GRANTED and this action is hereby DISMISSED WITHOUT PREJUDICE for lack of prosecution.

SO ORDERED THIS 7th day of March, 1996.

Thomas R. Brett

THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

FW
3-1

FILED

MAR 6 1996

Richard M. Lawrence, Court Clerk
U.S. DISTRICT COURT

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

PHILLIP LEE HULL, ET AL.,

Plaintiffs,

vs.

UNITED STATES OF AMERICA,

Defendant.

Case No. 88-C-1645-E

ENTERED ON DOCKET
DATE MAR 07 1996

ORDER

Pursuant to the request of the United States of America and the Guardian ad litem, Judith A. Finn, it is hereby ordered that all proper fees and costs incurred by the Guardian ad litem in the performance of her duties up to and including the date upon which this Order is entered shall be paid by the Defendant United States of America. All proper fees of the Guardian ad litem incurred subsequent to the date upon which this order is entered shall be paid by the Phillip Lee Hull Trust ("the Trust").

On December 14, 1995, the Internal Revenue Service ("IRS") issued a letter ruling to the Trustee of the Trust, concerning various income tax issues raised by the Trustee. This ruling concluded that the United States is to be treated as the owner of the entire Trust under Section 677(a)(2) of the Code, because of the reversion to the United States upon Phillip Lee Hull's death. Therefore, because the United States is not subject to federal income tax, the IRS ruled that any income earned by the Trust will not be subject to income tax. In addition, the IRS ruled that the payment of the award to the Trust was not a taxable event, that all payments by the Trust to or on behalf of Phillip Lee Hull are income tax-free, and that Phillip Lee Hull's parents do not receive taxable income by the Trust providing rent-free housing and family living expenses. According to its terms, this IRS ruling applies to the Trust during the entire duration of the Trust, provided that

the provisions of the Trust's governing instrument are not amended or modified in any respect.

Therefore, the Court specifically finds that the Trust document as it currently stands, creating a tax-exempt trust and also providing non-taxable distributions and benefits to Phillip Lee Hull and his parents, is highly beneficial to Phillip Lee Hull and best advances the interests and preferences of Phillip Lee Hull.

The Guardian ad litem will continue in this case to serve as the legal representative of Phillip Lee Hull and to ensure that the services rendered to Phillip Lee Hull comply with his best interests. At least semi-annually it shall be the duty of the Guardian ad litem to review the assessments and the plan of care for medical, therapeutic, and educational services for Phillip Lee Hull submitted by the Trustee as required by the Trust document, and to review the annual report of the Trustee regarding expenditures of the Trust and regarding the physical, developmental, emotional, and psychological condition of Phillip Lee Hull. The Trustee shall keep appropriate records of the assessments and reports of all therapists, therapy aides, physicians, and any other care-givers, as furnished to the Trustee by the Case Manager, upon which these plans and reports are based, for review, as needed, by the Guardian ad litem.

Within 30 days, the Trustee shall prepare a comprehensive annual report for 1995 concerning the overall status of Phillip Lee Hull, including a report on his physical, developmental, emotional, and psychological condition as required by the Trust document. The Guardian ad litem shall have 15 days in which to review the report and to file any objections.

The Court further funds that Tanya Hull's request for payment of medical services in the amount of $395 for Phillip G. Hull and $317 for Samatha S. Hull should be denied and that all future payments for the *indirect* benefit of Phillip Lee Hull shall be borne by the family from the $5,500 per month allowance or such other amount as the Court may direct and that the Trustee may, in its

sole discretion, approve amounts requested by the Case Manager for the *direct* benefit of Phillip Lee Hull, including but not limited to the acquisition of a computer not to exceed $40,000 cost plus additional components, provided the total cost will include training for the team to support him.

IT IS SO ORDERED.

JAMES O. ELLISON
United States District Judge

APPROVED AS TO FORM AND CONTENT:

Judith A. Finn,
Guardian ad litem for Phillip Lee Hull

Peter Bernhardt,
Assistant United States Attorney

James E. Bishop,
Attorney for Trustee

C:\WP2006\HULL.ORD

(44-176)

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

ALAN FARRIS and KELLY FARRIS,

Plaintiffs,

vs.

WAL-MART STORES, INC., an Arkansas Corporation,

Defendant.

Case No. 95-C-457E

JOURNAL ENTRY OF JUDGMENT

NOW ON the 20th, 21st and 22nd days of February, 1996, comes on for Jury Trial the above captioned cause. The Plaintiffs are present in person and represented by their attorney of record, Patrick Malloy, Jr., of the law firm of Malloy & Malloy. The Defendant is present by and through its corporate representative, Darrel Lansford and is represented by its counsel of record, Mark T. Steele and Steven E. Holden of the law firm, Best, Sharp, Holden, Sheridan, Best & Sullivan. A jury panel was called and sworn and voir dire proceedings are conducted. Each party exercises its preemptory challenges. A jury of seven persons is impaneled and sworn.

The parties present their opening statements and the Plaintiff proceeds to present its case in chief. Defendants demurrer to the evidence is overruled. Defendant then presents its case in chief and rests. The jury is instructed as to the issues involved and plaintiff and defense counsel are each provided with twenty-five minutes for closing arguments. The jury then retires to deliberate and after due deliberation returns with Verdict Form Three finding all issues in favor of the Defendant Wal-Mart Stores, Inc.

WHEREFORE, IT IS HEREBY ORDERED, ADJUDGED AND DECREED that based upon the trial of this action and the decision of the jury herein, judgment in all respects is awarded and entered in favor of the Defendant Wal-Mart Stores, Inc., dated this 5 day of March ____, 1996.

S/ JAMES O. ELLISON

HONORABLE JAMES O. ELLISON

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

ENTERED ON DOCKET
DATE 3-7-96

UNITED STATES OF AMERICA,

Plaintiff,

vs.

MARY T. JACKSON;
SHERRIE K. JACKSON;
STATE OF OKLAHOMA ex rel.
Oklahoma Tax Commission;
COUNTY TREASURER, Osage County,
Oklahoma;
BOARD OF COUNTY COMMISSIONERS,
Osage County, Oklahoma,

Defendants.

FILED

MAR 0 6 1996

Richard M. Lawrence, Clerk
U. S. DISTRICT COURT

CIVIL ACTION NO. 95 C 931K

ORDER

Upon the Motion of the United States of America, acting on behalf of the Secretary of Housing and Urban Development, by Stephen C. Lewis, United States Attorney for the Northern District of Oklahoma, through Loretta F. Radford, Assistant United States Attorney, and for good cause shown it is hereby **ORDERED** that this action shall be dismissed without prejudice.

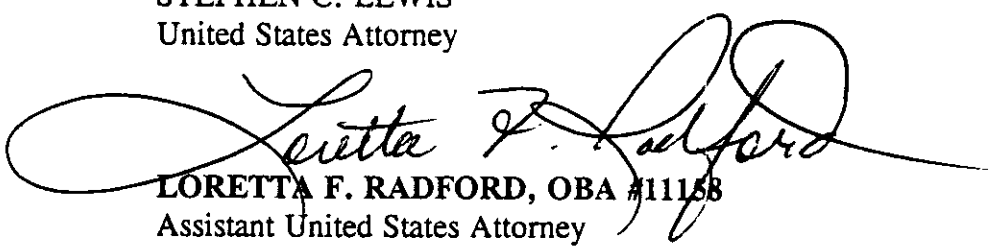
Dated this 6 day of March, 1996.

s/ TERRY C. KERN

UNITED STATES DISTRICT JUDGE

APPROVED AS TO FORM AND CONTENT:

STEPHEN C. LEWIS
United States Attorney



LORETTA F. RADFORD, OBA #11158
Assistant United States Attorney
3460 U.S. Courthouse
Tulsa, Oklahoma 74103
(918) 581-7463

LFR:flv

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

ENTERED ON DOCKET
DATE 3-7-96

UNITED STATES OF AMERICA,

Plaintiff,

vs.

JOE ALAN DUNSWORTH; JUDY G. DUNSWORTH aka Judy Gale Dunsworth; MARSHA GAYL CARSON; UNKNOWN SPOUSE OF Marsha Gayl Carson, if any; SECURITY PACIFIC FINANCIAL SERVICES, INC; COUNTY TREASURER, Tulsa County, Oklahoma; BOARD OF COUNTY COMMISSIONERS, Tulsa County, Oklahoma,

Defendants.

FILED

MAR 0 6 1996

Richard M. Lawrence, Clerk
U. S. DISTRICT COURT

Civil Case No. 95-C 380K

ORDER

Upon the Motion of the United States of America, acting on behalf of the Secretary of Housing and Urban Development, by Stephen C. Lewis, United States Attorney for the Northern District of Oklahoma, through Loretta F. Radford, Assistant United States Attorney, and for good cause shown, it is hereby ORDERED that the Entry of Default By Court Clerk filed on the 26th day of October, 1995, the Judgment of Foreclosure entered herein on the 31st day of October, 1995, and the Notice of Sale filed on the 8th day of February, 1996 are vacated, the sale now scheduled for the 21st day of March 1996, is canceled, and this action is hereby dismissed without prejudice.

Dated this 6 day of March, 1996.

s/ TERRY C. KERN
UNITED STATES DISTRICT JUDGE

APPROVED AS TO FORM AND CONTENT:

STEPHEN C. LEWIS
United States Attorney

LORETTA F. RADFORD, OBA #11158
Assistant United States Attorney
3460 U.S. Courthouse
Tulsa, OK 74103
(918) 581-7463

LFR:flv

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

ENTERED ON DOCKET
DATE 3-7-96

UNITED STATES OF AMERICA,

Plaintiff,

vs.

Z. DANNY DAVIS aka Danny Davis; DENISE DAVIS; STATE OF OKLAHOMA, ex rel. OKLAHOMA EMPLOYMENT SECURITY COMMISSION; COUNTY TREASURER, Tulsa County, Oklahoma; BOARD OF COUNTY COMMISSIONERS, Tulsa County, Oklahoma,

Defendants.

FILED

MAR 0 6 1996

Richard M. Lawrence, Clerk
U. S. DISTRICT COURT

Civil Case No. 95-C-0060-K

ORDER

Upon the Motion of the United States of America, acting on behalf of the Secretary of Housing and Urban Development, by Stephen C. Lewis, United States Attorney for the Northern District of Oklahoma, through Loretta F. Radford, Assistant United States Attorney, and for good cause shown, it is hereby ORDERED that the Judgment of Foreclosure entered herein on the 7th day of February, 1996, is vacated.

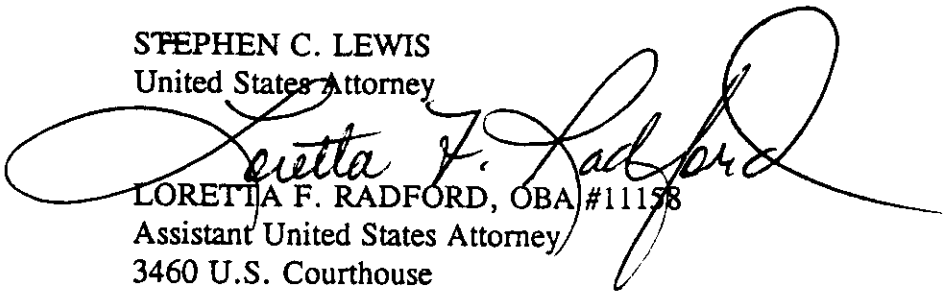
Dated this 6 day of March, 1996.

s/ TERRY C. KERN

UNITED STATES DISTRICT JUDGE

APPROVED AS TO FORM AND CONTENT:

STEPHEN C. LEWIS
United States Attorney



LORETTA F. RADFORD, OBA #11158
Assistant United States Attorney
3460 U.S. Courthouse
Tulsa, OK 74103
(918) 581-7463

LFR:flv

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

EMHISER RESEARCH LIMITED, and EMHISER MANUFACTURING LIMITED, Plaintiffs,	)	
vs.	)	Case No. 95-C-773H
ALBERT FOWLER; an individual; A.B. FOWLER TELEMETRY INC., a foreign corporation; and TRON-TEK, INC., an Oklahoma corporation, Defendants.	)	

STIPULATION OF DISMISSAL

COME NOW Emhiser Research Limited and Emhiser Manufacturing Limited, Plaintiffs, by and through their attorney of record, William S. Leach, and Defendants, Albert Fowler and A.B. Fowler Telemetry, Inc., by and through their attorney of record, James J. Proszek, and provide the following stipulation of dismissal:

1. This action was instituted by Plaintiffs on or about August 11, 1994.

2. Defendants filed a counterclaim for malicious prosecution/abuse of process on or about September 6, 1995.

3. Plaintiffs moved for summary judgment as to Defendants' counterclaims, which motion for summary judgment was sustained by the Court.

4. On January 22, 1996, the Court entered its Judgment relating to enforcement of the previously entered Canadian order.

5. Plaintiffs have informed the Court that they intend to dismiss without prejudice their claims for money damages against Defendants, and do hereby dismiss same without prejudice.

6. Consequently, all of the issues arising in this litigation have either been disposed of by the Court, disposed of by agreement of the parties, or voluntarily dismissed without prejudice, such that all issues remaining in this litigation have now been resolved.

Respectfully submitted,

RHODES, HIERONYMUS, JONES, TUCKER & GABLE

By: _____

William S. Leach, OBA #14892
P.O. Box 21100
Tulsa, Oklahoma 74121-1100
Oneok Plaza
100 W. 5th Street, Suite 400
Tulsa, Oklahoma 74103-4287
(918) 582-1173
Attorney for Plaintiffs

and

Amsterdam & Peroff
Barristers and Solicitors
150 York Street, Suite 1902
Toronto, Ontario
M5H 3S5

Cynthia Amsterdam
(416) 367-4100

Solicitors for the Plaintiffs

_____

James J. Proszek
Gourley & Proszek, P.L.L.C.
2642 East 21st Street, Suite 296
Tulsa, Oklahoma 74114-1740
(918) 748-7900

Attorneys for Albert Fowler and A.B. Fowler Telemetry, Inc.

g:\lit\lvs\emhiser\pleading\Stipulation.001

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

KENNETH R. ABEL,

Plaintiff,

v.

SOCIAL SECURITY ADMINISTRATION,

Defendant.

No. 95-C-352-J

ADMINISTRATIVE CLOSING ORDER

Pursuant to the Motion of the Defendant, this case was remanded on June 8, 1995, under "sentence six" for reconstruction of the claim file. In accordance with N.D. LR 41, it is hereby ordered that the Clerk administratively terminate this action in his records, without prejudice to the rights of the parties to reopen the proceedings for the entry of any stipulation or order, or for any other purpose required to obtain a final determination of the litigation.

IT IS SO ORDERED.

Dated this 6 day of March 1996.

Sam A. Joyner
United States Magistrate Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

JLN as Mother and Next Friend of TLN,
Plaintiff,

v.

STATE OF OKLAHOMA, ex rel., DEPARTMENT OF HUMAN SERVICES,
Defendant.

Case No. 95-C-856-H

ORDER

On September 11, 1995, the Court entered an Order in the above-captioned case directing Plaintiff to file an amended complaint within ten days from the date of the Order. The Order stated in pertinent part as follows:

> Therefore, the Court hereby orders that, if Plaintiff possesses facts sufficient to state a claim under the [Indian Child Welfare Act], then Plaintiff shall file an amended complaint alleging such facts within ten (10) days from the date of the entry of this Order. See, e.g., Roman-Nose, 967 F.2d at 436-37 (pleading entitled "petition for writ of habeas corpus" construed as possible claim under the Act). If Plaintiff fails to file an amended complaint within the allotted time, then the Court must dismiss the case for lack of subject matter jurisdiction, see Fed. R. Civ. P. 12(h)(3) ("Whenever it appears by suggestion of the parties or otherwise that the court lacks jurisdiction of the subject matter, the court shall dismiss the action."). Further, if Plaintiff was to file an amended complaint, but that amended complaint did not allege sufficient facts to support Plaintiff's claim, then that complaint would be subject to a motion to dismiss for failure to state claim under Federal Rule of Civil Procedure 12(b)(6).

Plaintiff has failed to timely file an amended complaint. Therefore, the Court hereby dismisses this action for lack of subject matter jurisdiction.

IT IS SO ORDERED.

This 6TH day of March, 1996.

Sven Erik Holmes
United States District Judge

4

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

TRACY DUNBAR,

Plaintiff,

v.

BS&B SAFETY SYSTEMS, INC., and DAVID BRUMBAUGH,

Defendants.

Case No. 95-C-605-H

ORDER

This matter comes before the Court on Defendant David Brumbaugh's Motion to Dismiss, or in the alternative, Motion for Summary Judgment (Docket #3).

Ms. Dunbar brought this action pursuant to Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e to 2000e-17, alleging that Mr. Brumbaugh sexually harassed her during her employment with BS&B Safety Systems, Inc. Mr. Brumbaugh filed this motion, asserting that he should be dismissed from the action by virtue of the fact that he was not a named respondent in Ms. Dunbar's EEOC complaint. Because dismissal is proper on other grounds, the Court need not address this argument.

The Tenth Circuit has held that supervisors who are charged with sexual harassment may be personally liable under Title VII only if they are "the equivalent or near-equivalent of true employers." Ball v. Renner, 54 F.3d 664, 668 (10th Cir. 1995). To establish an employer-like status, the Title VII plaintiff must allege that the supervisor exercised "employer-like functions vis-a-vis" her. Id. These functions include playing a role in hiring, firing, and work assignments. Id.

In her Complaint, Ms. Dunbar alleges only that Mr. Brumbaugh is "an employee of BS&B Safety Systems, Inc." Compl. at 1. She makes no allegations regarding his role in the company or his authority vis-a-vis her. Furthermore, at a status hearing held on January 22, 1996, counsel for

Ms. Dunbar conceded that Mr. Brumbaugh was not an employer for Title VII purposes. The Court therefore concludes that she has failed to state a claim against Mr. Brumbaugh under Title VII. Accordingly, his Motion to Dismiss is hereby granted (Docket #3).

IT IS SO ORDERED.

This 6TH day of March, 1996.

Sven Erik Holmes
United States District Judge

IN THE UNITED STATES DISTRICT COURT FOR THE

NORTHERN DISTRICT OF OKLAHOMA

ST. JOHN MEDICAL CENTER, INC., an Oklahoma nonprofit corporation, HILLCREST MEDICAL CENTER, an Oklahoma nonprofit corporation, and OSTEOPATHIC HOSPITAL FOUNDERS ASSOCIATION, INC., an Oklahoma nonprofit corporation,

Plaintiffs,

vs.

UNITED STATES OF AMERICA,

Defendant.

Case No. 94-C-163-BU

ORDER

This matter comes before the Court upon the Motion to Award Attorney Fees filed by Plaintiffs, St. John Medical Center, Inc., Hillcrest Medical Center and Osteopathic Hospital Founders Association, Inc. Defendant, United States of America, has responded to the motion and Plaintiffs have replied thereto. Based upon the parties' submissions, the Court makes its determination.

Plaintiffs commenced this action to recover federal transportation excise taxes, penalties and interest paid pursuant to deficiency notices issued by the Internal Revenue Service. On November 16, 1995, this Court entered judgment in favor of Plaintiffs. Plaintiffs now seek to recover reasonable litigation costs against Defendant under 26 U.S.C. § 7430. In order to recover litigation costs, Plaintiffs must prove that: (1) all administrative remedies have been exhausted; (2) the requested award constitutes "reasonable litigation costs" in accordance with

section 7430(c)(4)(A); and (3) Plaintiffs are the "prevailing party" as defined by section 7430(c)(4)(A). Pate v. United States, 987 F.2d 457, 459 (10th Cir. 1993). Defendant concedes that all administrative remedies have been exhausted by Plaintiffs. It disputes, however, that the requested award constitutes "reasonable litigation costs" and that Plaintiffs are the prevailing party.

A "prevailing party" is one who establishes that the position of the United States in a civil proceeding was not substantially justified and who has substantially prevailed in the controversy. 26 U.S.C. § 7430(c)(4)(A).[1] Defendant concedes that Plaintiffs substantially prevailed in the controversy, but argues, contrary to Plaintiffs' contentions, that its position was substantially justified.

"Substantially justified" has been defined as having a "reasonable basis both in law and in fact" or sufficient to "satisfy a reasonable person." Pierce v. Underwood, 487 U.S. 552, 563-65 (1988). In determining whether the position of the United States was "substantially justified," the Court must look at all facts and circumstances as well as legal precedents relating to the case, bearing in mind that Plaintiffs bear the burden of proof. Anthony v. United States, 987 F.2d 670, 674 (10th Cir. 1993). The Government's failure to prevail in the underlying litigation does

---

[1]As Plaintiffs are section 501(c)(3) organizations, they are exempt from the net-worth requirements contained in 28 U.S.C. § 2412(d)(2)(B) and thus are exempt from the net-worth requirements for prevailing party status. See, 26 U.S.C. § 7430(c)(4)(A)(iii)(incorporating 28 U.S.C. § 2412(d)(2)(B), as in effect on October 22, 1986).

not make its position necessarily unreasonable, but it remains a factor for the Court's consideration. Id.

Applying the foregoing test, the Court concludes that Defendant's position was substantially justified. Section 4261(a) of Title 26 provided that the transportation excise taxes "shall be paid by the person making the payment subject to the tax." 26 U.S.C. § 4261(d). Section 4263(c) of Title 26 also provided that if the taxes are not paid at the time payment for transportation is made and is not collected under any other provision, then the tax is to be paid "by the person paying for the transportation or by the person using the transportation." Although the Court found that Plaintiffs' patients were the "person[s] making the payment subject to the tax," the Court concludes that Defendant's position that Plaintiffs were the "person[s] making the payment subject to the tax" was not unreasonable. AirEvac of Tulsa, Inc. was formed by Plaintiffs to transport patients to their hospitals. All payments to AirEvac for the patients' transportation were made by Plaintiffs. Under the particular facts of this case, the Court cannot conclude that Defendant's position had no reasonable basis in law and fact.

Plaintiffs argue that Defendant failed to respond to the legislative history and case law offered by Plaintiffs in support of their position. Similarly, Plaintiffs argue that with the exception of Rev. Rul. 55-534, Defendant failed to respond to the IRS' revenue rulings offered by Plaintiff. Defendant's position in this litigation, however, was that the express language of the

taxing statute mandated that Plaintiffs were liable for the excise tax under the facts of this case and, therefore, resort to legislative history and revenue rulings was unnecessary. In any event, Defendant did address the legislative history, case law and IRS' revenue rulings and argued that they were unpersuasive or distinguishable. In the Court's view, Defendant's position was not unreasonable.

Accordingly, the Motion to Award Attorneys Fees (Docket Entry #38) is **DENIED**.

ENTERED this 5th day of March, 1996.

MICHAEL BURRAGE
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT FOR THE

NORTHERN DISTRICT OF OKLAHOMA

FILED

MAR 5 - 1996

Richard M. Lawrence, Clerk
U. S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

TOME R. HAYES,

Plaintiff,

vs.

INDEPENDENT SCHOOL DISTRICT NO. 5 OF TULSA COUNTY, OKLAHOMA, a/k/a JENKS PUBLIC SCHOOLS, TERRY ALMON, BILLIE MILLS, and MIKE FRANCISCO,

Defendants.

Case No. 95-C-655-BU

ENTERED ON DOCKET

DATE MAR 06 1996

JUDGMENT

This action came before the Court on the defendants' Motion for Summary Judgment and subsequently for trial before the Court and a jury, Honorable Michael Burrage, District Judge, presiding, and certain issues having been duly considered by the Court in the defendants' Motion for Summary Judgment and certain issues having been tried by a jury, and the Court and jury having rendered its decision and verdict, respectively,

IT IS HEREBY ORDERED AND ADJUDGED that judgment is entered in favor of the defendants, Terry Almon, Billie Mills and Mike Francisco, and against the plaintiff, Tome R. Hayes, that the plaintiff take nothing from the defendants, Terry Almon, Billie Mills and Mike Francisco, and that the defendants, Terry Almon, Billie Mills and Mike Francisco, recover of the plaintiff, Tome R. Hayes, their costs of action.

IT IS FURTHER ORDERED AND ADJUDGED that judgment is entered in favor of the plaintiff, Tome R. Hayes, and against the defendant,

Independent School District No. 5 of Tulsa County, Oklahoma a/k/a Jenks Public Schools, that the plaintiff recover from the defendant, Independent School District No. 5 of Tulsa County, Oklahoma a/k/a Jenks Public Schools, actual damages in the sum of $300,000.00 with interest thereon at the rate provided by law, and that the plaintiff, Tome R. Hayes, recover of the defendant, Independent School District No. 5 of Tulsa County, Oklahoma a/k/a Jenks Public Schools, any costs of this action provided by law.

Dated at Tulsa, Oklahoma, this 5th day of March, 1996.

MICHAEL BURRAGE
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

ROLAND D. FOSTER,

Petitioner,

vs.

RON CHAMPION, et al.,

Respondent.

Case No. 95-C-325-BU

ORDER

On April 10, 1995, the petitioner, Roland D. Foster, filed a Petition for Writ of Habeas Corpus under 28 U.S.C. § 2254. Pursuant to 28 U.S.C. § 636(b)(1)(B), this Court referred the matter to United States Magistrate Judge John Leo Wagner for the purpose of submitting a Report and Recommendation. On February 15, 1996, Magistrate Judge Wagner issued a Report and Recommendation. In the Report and Recommendation, Magistrate Judge Wagner recommended that the Petition for Writ of Habeas Corpus be dismissed and that the petitioner's Motion to Expedite Judgment be denied.

This matter now comes before the Court upon the timely objections of the petitioner to the Report and Recommendation issued by Magistrate Judge Wagner.[1] Pursuant to 28 U.S.C. § 636(b), the Court has conducted a de novo review of the objections. Having carefully and completely reviewed the petitioner's objections, Magistrate Judge Wagner's Report and Recommendation, and the record submitted to the Court, the Court finds that the

[1]The petitioner filed two objections to the Report and Recommendation on February 26, 1996 and on February 28, 1996, respectively. The Court notes that the objections are identical.

petitioner's objections are without merit. The Oklahoma courts have determined that an inmate whose conviction predates the 1988 amendment to Okla. Stat. tit. 57, § 138 is entitled to the benefit of whichever version of the statute is more favorable to him, but not both. See, State ex. rel. Maynard v. Page, 798 P.2d 628, 629 (Okla. Crim. App. 1990); Ekstrand v. State, 791 P.2d 92, 95 (Okla. Crim. App. 1900). The petitioner, therefore, is not entitled to the benefit of both versions of § 138.[2]

The Court accepts the Report and Recommendation issued by Magistrate Judge Wagner in every respect except for the recommendation that the Petition for Writ of Habeas Corpus be dismissed under Rule 12(b)(6), Fed. R. Civ. P. Instead, the Court finds that the Petition for Writ of Habeas Corpus should be denied for the reasons stated herein and in the Report and Recommendation.

Accordingly, the Court hereby ACCEPTS the Report and Recommendation (Docket Entry #9) issued by Magistrate Judge Wagner as stated, DENIES the Petition for Writ of Habeas Corpus (Docket Entry #1) based upon the reasons set forth in the Report and

---

[2]In his objections, the petitioner argues that he has suffered adverse discrimination because Magistrate Judge Wagner permitted the respondents to file a response after the court-ordered deadline. This Court disagrees. The record reveals that Magistrate Judge Wagner issued an order dated July 6, 1995 which directed a response within twenty days. The order was not filed until July 7, 1995. The order stated that extensions of time would only be granted for good cause shown and in no event for longer than an additional twenty days. The respondents filed a request for an extension of time on July 27, 1995. For good cause shown, Magistrate Judge Wagner granted the respondents a 15-day extension of time to file their response. On August 3, 1995, the respondents filed their response, which was clearly within the 15-day extension of time.

Recommendation. The Court also DENIES the Motion to Expedite Judgment (Docket Entry #8).

ENTERED this 5th day of March, 1996.

MICHAEL BURRAGE
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

FILED

MAR - 5 1996

chard M. Lawrence, Court Clerk
U.S. DISTRICT COURT

UNITED STATES OF AMERICA, Plaintiff, vs. MELVIN JACKSON BARNARD; VANESSA JOY BARNARD; STATE OF OKLAHOMA, ex rel. DEPARTMENT OF HUMAN SERVICES; FORD MOTOR CREDIT COMPANY; FLEET REAL ESTATE FUNDING CORP., successor to Security Pacific Mortgage Corporation; FIREMAN'S FUND MORTGAGE CORPORATION fka Manufacturers Hanover Mortgage Corporation; CITY OF CLAREMORE, Oklahoma; COUNTY TREASURER, Rogers County, Oklahoma; BOARD OF COUNTY COMMISSIONERS, Rogers County, Oklahoma, Defendants.	)	Civil Case No. 95 C 651B

ENTERED ON DOCKET
DATE MAR 6 1996

JUDGMENT OF FORECLOSURE

This matter comes on for consideration this 4 day of March, 1996. The Plaintiff appears by Stephen C. Lewis, United States Attorney for the Northern District of Oklahoma, through Loretta F. Radford, Assistant United States Attorney; the Defendants, COUNTY TREASURER, Rogers County, Oklahoma, and BOARD OF COUNTY COMMISSIONERS, Rogers County, Oklahoma, appear by Michele L. Schultz, Assistant District Attorney, Rogers County, Oklahoma; the Defendant, FORD MOTOR CREDIT COMPANY, appears by William L. Nixon, Jr.; the Defendant, CITY OF CLAREMORE, Oklahoma, appears not having previously filed a Disclaimer; and the

Defendants, MELVIN JACKSON BARNARD, VANESSA JOY BARNARD, STATE OF OKLAHOMA, ex rel. DEPARTMENT OF HUMAN SERVICES, FLEET REAL ESTATE FUNDING CORP., successor to Security Pacific Mortgage Corporation, and FIREMAN'S FUND MORTGAGE CORPORATION, fka Manufacturers Hanover Mortgage Corporation, appear not, but make default.

The Court being fully advised and having examined the court file finds that the Defendant, VANESSA JOY BARNARD, was served a copy of Summons and Complaint on August 25, 1995, by Certified Mail; that the Defendant, STATE OF OKLAHOMA, ex rel. DEPARTMENT OF HUMAN SERVICES, was served a copy of Summons and Complaint on August 21, 1995, by Certified Mail; that the Defendant, FORD MOTOR CREDIT COMPANY, signed a Waiver of Summons on July 26, 1995; that Defendant, FLEET REAL ESTATE FUNDING CORP., successor to Security Pacific Mortgage Corporation, signed a Waiver of Summons on August 4, 1995; that Defendant, FIREMAN'S FUND MORTGAGE CORPORATION, fka Manufacturers Hanover Mortgage Corporation, signed a Waiver of Summons on July 26, 1995; that Defendant, CITY OF CLAREMORE, Oklahoma, was served a copy of Summons and Complaint on July 18, 1995, by Certified mail; that Defendant, COUNTY TREASURER, Rogers County, Oklahoma, was served a copy of Summons and Complaint on July 18, 1995, by Certified mail; and that Defendant, BOARD OF COUNTY COMMISSIONERS, Rogers County, Oklahoma, was served a copy of Summons and Complaint on July 18, 1995, by Certified Mail.

The Court further finds that the Defendant, MELVIN JACKSON BARNARD, was served by publishing notice of this action in the Claremore Daily Progress, a newspaper of general circulation in Rogers County, Oklahoma, once a week for six (6) consecutive weeks

beginning October 22, 1995, and continuing through November 26, 1995, as more fully appears from the verified proof of publication duly filed herein; and that this action is one in which service by publication is authorized by 12 O.S. Section 2004(c)(3)(c). Counsel for the Plaintiff does not know and with due diligence cannot ascertain the whereabouts of the Defendant, MELVIN JACKSON BARNARD, and service cannot be made upon said Defendant within the Northern Judicial District of Oklahoma or the State of Oklahoma by any other method, or upon said Defendant without the Northern Judicial District of Oklahoma or the State of Oklahoma by any other method, as more fully appears from the evidentiary affidavit of a bonded abstracter filed herein with respect to the last known address of the Defendant, MELVIN JACKSON BARNARD. The Court conducted an inquiry into the sufficiency of the service by publication to comply with due process of law and based upon the evidence presented together with affidavit and documentary evidence finds that the Plaintiff, United States of America, acting through the Department of Housing and Urban Development, and its attorneys, Stephen C. Lewis, United States Attorney for the Northern District of Oklahoma, through Loretta F. Radford, Assistant United States Attorney, fully exercised due diligence in ascertaining the true name and identity of the party served by publication with respect to his present or last known place of residence and/or mailing address. The Court accordingly approves and confirms that the service by publication is sufficient to confer jurisdiction upon this Court to enter the relief sought by the Plaintiff, both as to subject matter and the Defendant served by publication.

It appears that the Defendants, COUNTY TREASURER, Rogers County, Oklahoma and BOARD OF COUNTY COMMISSIONERS, filed their Answer on August 30, 1995; that the Defendant, CITY OF CLAREMORE, Oklahoma, filed its Disclaimer on

August 9, 1995; that the Defendant, FORD MOTOR CREDIT COMPANY, filed its Answer on July 31, 1995; that the Defendants, MELVIN JACKSON BARNARD, VANESSA JOY BARNARD, STATE OF OKLAHOMA, ex rel. DEPARTMENT OF HUMAN SERVICES, FLEET REAL ESTATE FUNDING CORP., successor to Security Pacific Mortgage Corporation, FIREMAN'S FUND MORTGAGE CORPORATION, fka Manufacturers Hanover Mortgage Corporation, have failed to answer and their default has therefore been entered by the Clerk of this Court.

The Court further finds that the Defendants, MELVIN JACKSON BARNARD and VANESSA JOY BARNARD, were granted a Divorce on March 16, 1994, in Case No. FD-94-49, in Rogers County, Oklahoma. The Defendants, MELVIN JACKSON BARNARD and VANESSA JOY BARNARD, are both single unmarried persons.

The Court further finds that this is a suit based upon a certain mortgage note and for foreclosure of a mortgage securing said mortgage note upon the following described real property located in Rogers County, Oklahoma, within the Northern Judicial District of Oklahoma:

LOT EIGHT (8), IN BLOCK FOUR (4), OF WESTGATE MANOR ADDITION TO THE CITY OF CLAREMORE, ROGERS COUNTY, OKLAHOMA, ACCORDING TO THE RECORDED PLAT THEREOF.

The Court further finds that on July 22, 1983, Ricky K. Edgecombe and Charlotte Edgecombe, executed and delivered to UNITED BANKERS MORTGAGE CORPORATION, their mortgage note in the amount of $45,400.00, payable in monthly installments, with interest thereon at the rate of Twelve and Three Quarters percent (12.75%) per annum.

The Court further finds that as security for the payment of the above-described note, Ricky K. Edgecombe and Charlotte Edgecombe, husband and wife, executed and delivered to UNITED BANKERS MORTGAGE CORPORATION a mortgage dated July 22, 1983, covering the above-described property. Said mortgage was recorded on July 25, 1983, in Book 652, Page 604, in the records of Rogers County, Oklahoma. This Mortgage was re-recorded on August 16, 1983, in Book 654, Page 526, in the records of Rogers County, Oklahoma.

The Court further finds that on July 22, 1983, United Bankers Corporation, assigned the above-described mortgage note and mortgage to SECURITY PACIFIC MORTGAGE CORPORATION. This Assignment of Mortgage was recorded on August 8, 1983, in Book 653, Page 808, in the records of Rogers County, Oklahoma. This Assignment of Mortgage was re-recorded on August 26, 1983, in Book 655, Page 486, in the records of Rogers County, Oklahoma, to show the mortgage refiling information.

The Court further finds that on September 6, 1985, SECURITY PACIFIC MORTGAGE CORPORATION, assigned the above-described mortgage note and mortgage to MANUFACTURERS HANOVER MORTGAGE CORPORATION, its successors and/or assigns. This Assignment of Mortgage was recorded on December 27, 1985, in Book 720, Page 805, in the records of Rogers County, Oklahoma.

The Court further finds that on January 5, 1989, Fireman's Fund Mortgage Corporation fka Manufacturers Hanover Mortgage Corporation, assigned the above-described mortgage note and mortgage to the Secretary of Housing and Urban Development of Washington, D.C., his successors and assigns. This Assignment of Mortgage was recorded on January 24, 1990, in Book 800, Page 810, in the records of Rogers County, Oklahoma.

The Court further finds that on June 19, 1987, Ricky K. Edgecombe and Charlotte Edgecombe, husband and wife, granted a general warranty deed to Melvin Jackson Barnard and Vanessa Joy Barnard, then Husband and Wife. This Deed was recorded with the Rogers County Clerk on July 8, 1987, in Book 763, Page 569, in the records of Rogers County, Oklahoma, and the Defendants, MELVIN JACKSON BARNARD and VANESSA JOY BARNARD, assumed thereafter payment of the amount due pursuant to the note and mortgage described above.

The Court further finds that on December 27, 1988, the Defendants, MELVIN JACKSON BARNARD and VANESSA JOY BARNARD, entered into an agreement with the Plaintiff lowering the amount of the monthly installments due under the note in exchange for the Plaintiff's forbearance of its right to foreclose. Superseding agreements were reached between these same parties on February 1, 1989, February 23, 1990, May 1, 1990, November 15, 1990, September 19, 1991 and January 1, 1992.

The Court further finds that the Defendants, MELVIN JACKSON BARNARD and VANESSA JOY BARNARD, made default under the terms of the aforesaid note and mortgage, as well as the terms and conditions of the forbearance agreements, by reason of their failure to make the monthly installments due thereon, which default has continued, and that by reason thereof the Defendants, MELVIN JACKSON BARNARD and VANESSA JOY BARNARD, are indebted to the Plaintiff in the principal sum of $90,861.07, plus interest at the rate of 12.75 percent per annum from March 22, 1995 until judgment, plus interest thereafter at the legal rate until fully paid, and the costs of this action.

. The Court further finds that the Defendant, FORD MOTOR CREDIT COMPANY, has a lien on the property which is the subject matter of this action by virtue of a

judgment in the amount of $4,185.48 which became a lien on the property as of March 21, 1995. Said lien is inferior to the interest of the Plaintiff, United States of America.

The Court further finds that the Defendants, MELVIN JACKSON BARNARD, VANESSA JOY BARNARD, STATE OF OKLAHOMA, ex rel. DEPARTMENT OF HUMAN SERVICES, FLEET REAL ESTATE FUNDING CORP., successor to Security Pacific Mortgage Corporation, FIREMAN'S FUND MORTGAGE CORPORATION, fka Manufacturers Hanover Mortgage Corporation, are in default, and have no right, title or interest in the subject real property.

The Court further finds that the Defendants, COUNTY TREASURER and BOARD OF COUNTY COMMISSIONERS, Rogers County, Oklahoma, claim no right, title or interest in the subject real property.

The Court further finds that the Defendant, CITY OF CLAREMORE, Oklahoma, Disclaims any right, title or interest in the subject real property.

The Court further finds that pursuant to 12 U.S.C. 1710(1) there shall be no right of redemption (including in all instances any right to possession based upon any right of redemption) in the mortgagor or any other person subsequent to the foreclosure sale.

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that the Plaintiff, the United States of America, acting on behalf of the Secretary of Housing and Urban Development, have and recover judgment In Rem against the Defendants, MELVIN JACKSON BARNARD and VANESSA JOY BARNARD, in the principal sum of $90,861.07, plus interest at the rate of 12.75 percent per annum from March 22, 1995 until judgment, plus interest thereafter at the current legal rate of 5.25 percent per annum until paid, plus the costs of this action, plus any additional sums advanced or to be advanced or expended during

this foreclosure action by Plaintiff for taxes, insurance, abstracting, or sums for the preservation of the subject property.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Defendant, FORD MOTOR CREDIT COMPANY, have and recover judgment in the amount of $4,185.48 for its Judgment, plus the costs and interest.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Defendants, MELVIN JACKSON BARNARD, VANESSA JOY BARNARD, STATE OF OKLAHOMA, ex rel. DEPARTMENT OF HUMAN SERVICES, FLEET REAL ESTATE FUNDING CORP., successor to Security Pacific Mortgage Corporation, FIREMAN'S FUND MORTGAGE CORPORATION, fka Manufacturers Hanover Mortgage Corporation COUNTY TREASURER and BOARD OF COUNTY COMMISSIONERS, Rogers County, Oklahoma, and CITY OF CLAREMORE, Oklahoma, have no right, title, or interest in the subject real property.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that upon the failure of said Defendants, MELVIN JACKSON BARNARD and VANESSA JOY BARNARD, to satisfy the judgment In Rem of the Plaintiff herein, an Order of Sale shall be issued to the United States Marshal for the Northern District of Oklahoma, commanding him to advertise and sell according to Plaintiff's election with or without appraisement the real property involved herein and apply the proceeds of the sale as follows:

First:

In payment of the costs of this action accrued and accruing incurred by the Plaintiff, including the costs of sale of said real property;

Second:

In payment of the judgment rendered herein in favor of the Plaintiff;

Third:

In payment of the Defendant, FORD MOTOR CREDIT COMPANY, in the amount of $4,185.48, for its judgment.

The surplus from said sale, if any, shall be deposited with the Clerk of the Court to await further Order of the Court.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that pursuant to 12 U.S.C. 1710(1) there shall be no right of redemption (including in all instances any right to possession based upon any right of redemption) in the mortgagor or any other person subsequent to the foreclosure sale.

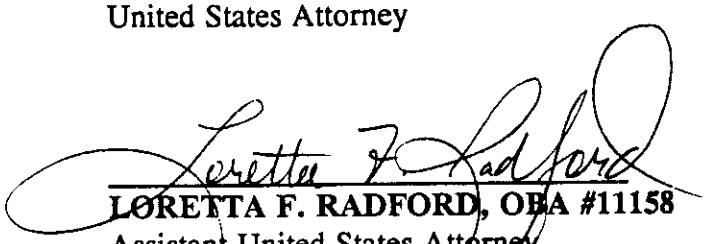
IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that from and after the sale of the above-described real property, under and by virtue of this judgment and decree, all of the Defendants and all persons claiming under them since the filing of the Complaint, be and they are forever barred and foreclosed of any right, title, interest or claim in or to the subject real property or any part thereof.

S/ THOMAS R. BRETT

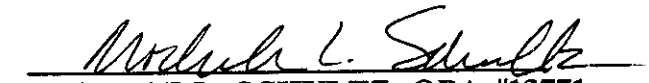
UNITED STATES DISTRICT JUDGE

APPROVED:

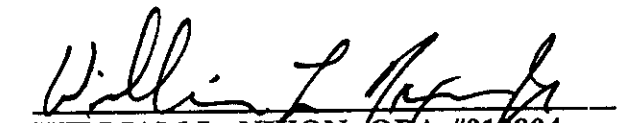
STEPHEN C. LEWIS
United States Attorney



LORETTA F. RADFORD, OBA #11158
Assistant United States Attorney
3460 U.S. Courthouse
Tulsa, Oklahoma 74103
(918) 581-7463



MICHELE L. SCHULTZ, OBA #13771
Assistant District Attorney
219 S. Missouri, Room 1-111
Claremore, OK 74017
(918) 341-3164
Attorney for Defendants,
County Treasurer and
Board of County Commissioners,
Rogers County, Oklahoma



WILLIAM L. NIXON, OBA #012804
LOVE, BEAL & NIXON, P.C.
P.O. Box 32738
Oklahoma City, OK 73123
(405) 720-0565
Attorney for Defendant,
Ford Motor Credit Co.

Judgment of Foreclosure
Civil Action No. 95 C 651B

LFR:flv

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

JUNE J. LAWSON,
SS# 527-46-7188

Plaintiff,

v.

SHIRLEY S. CHATER, Commissioner of Social Security,

Defendant.

No. 95-C-419-J

JUDGMENT

This action has come before the Court for consideration and an Order affirming the decision of the Secretary has been entered. Judgment for the Defendant and against the Plaintiff is hereby entered pursuant to the Court's Order.

It is so ordered this 5 day of March 1996.

Sam A. Joyner
United States Magistrate Judge

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

SAMI SAMRA,

Plaintiff,

v.

LORI, INC.,

Defendant.

Case No. 95-C-326-H

JUDGMENT

This matter came before the Court on a Motion for Summary Judgment by Defendant. The Court duly considered the issues and rendered a decision in accordance with the order filed on March 5, 1996.

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that judgment is hereby entered for the Defendant and against the Plaintiff.

IT IS SO ORDERED.

This 5TH day of March, 1996.

Sven Erik Holmes
United States District Judge

21

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

SAMI SAMRA,

Plaintiff,

v.

LORI, INC.,

Defendant.

Case No. 95-C-326-H

ORDER

This matter comes before the Court on the Motion for Summary Judgment by Defendant Lori, Inc. ("Lori"). Plaintiff alleges that Defendant violated Title VII by failing to promote him and by discharging him on the basis of his national origin (Lebanese) and/or religion (Muslem). Plaintiff further alleges that Defendant discharged him in retaliation for his opposition to a discriminatory practice in violation of the public policy of the State of Oklahoma. Lori moves for summary judgment on all claims.

Summary judgment is appropriate where "there is no genuine issue as to any material fact," Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986); Windon Third Oil & Gas Drilling Partnership v. Federal Deposit Insurance Corp., 805 F.2d 342, 345 (10th Cir. 1986), cert. denied, 480 U.S. 947 (1987), and "the moving party is entitled to judgment as a matter of law," Fed. R. Civ. P. 56(c). In Celotex, the Supreme Court stated:

> [t]he plain language of Rule 56 (c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial.

477 U.S. at 322.

A party opposing a properly supported motion for summary judgment must offer evidence, in admissible form, of specific facts, Fed. R. Civ. P. 56(e), sufficient to raise a "genuine issue of material fact." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247-48 (1986)

20

("the mere existence of some alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment"). "Factual disputes that are irrelevant or unnecessary will not be counted." Id. at 248.

Summary judgment is only appropriate if "there is [not] sufficient evidence favoring the nonmoving party for a jury to return a verdict for that party." Id. at 250. The Supreme Court stated:

> [t]he mere existence of a scintilla of evidence in support of the plaintiff's position will be insufficient; there must be evidence on which the jury could reasonably find for the plaintiff.

Id. at 252. Thus, to defeat a summary judgment motion, the nonmovant "must do more than simply show that there is some metaphysical doubt as to the material facts." Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 585-86 (1986); Anderson, 477 U.S. at 250 ("there is no issue for trial unless there is sufficient evidence favoring the nonmoving party for a jury to return a verdict for that party. If the evidence is merely colorable, or is not significantly probative, summary judgment may be granted." (citations omitted)).

In essence, the inquiry for the Court is "whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." Anderson, 477 U.S. at 250. In its review, the Court construes the record in the light most favorable to the party opposing summary judgment. Boren v. Southwestern Bell Tel. Co., 933 F.2d 891, 892 (10th Cir. 1991).

Lori moves for summary judgment on the grounds that Plaintiff has produced no evidence of employment discrimination or of retaliation. Lori also asserts that, except for Plaintiff's claim of discriminatory discharge, all his claims are time-barred because he did not comply with the requirement that a charge of discrimination be filed with the EEOC within 300 days of the other alleged discriminatory acts.

Plaintiff has filed a brief responding to Lori's motion; however, Plaintiff has failed to attach affidavits, deposition testimony, interrogatory responses, or any other exhibits contemplated by Fed. R. Civ. P. 56 in support of his response. Plaintiff has thus failed to demonstrate through admissible evidence "a triable conflict on facts material to [his claim]." Rozek v. Topolnicki, 865 F.2d 1154, 1156 & n.3 (10th Cir. 1989). Although Plaintiff refers to his own deposition testimony and to a questionnaire he submitted to the Oklahoma Human Rights Commission, he did not place any portion of the deposition or the questionnaire into the court record. Even assuming, however, that Plaintiff has accurately represented the contents of his own deposition, these representations do not create a genuine issue of material fact. Further, Plaintiff's conclusory statements in his brief about the alleged discriminatory behaviour he suffered at the hands of Lori do not establish an issue of fact. See McVay v. Western Plains Corp., 823 F.2d 1395, 1398 (10th Cir. 1987).

Plaintiff's response is not sufficient to overcome Lori's motion for summary judgment. "To withstand summary judgment, it is incumbent upon plaintiff to present evidence of sufficient quantity or quality to enable a jury to reasonably find that plaintiff has proven her case." Lawrence v. IBP, Inc., Civ. A. No. 94-2027-EEO, 1995 Westlaw 462235 (D. Kan. July 24, 1995) ("the requirement that evidence be generated in a context contemplated by Rule 56(c) serves an essential purpose of flushing out the point for which plaintiff offers the evidence."). Here, Plaintiff has produced no evidence at all, and, therefore, Plaintiff may not avoid summary judgment. Tillett v. Lujan, 931 F.2d 636, 639 (10th Cir. 1991).

Plaintiff also asserts in his response that "Defendant has failed to cooperate in discovery, in that Defendant failed or refused to respond to discovery requests submitted by Plaintiff prior to applicable discovery deadlines, and to the extent that Defendant has responded once Plaintiff brought such deficiency to its attention, Defendant has refused to fully respond to Plaintiff's discovery requests." However, Plaintiff did not make a Fed. R. Civ. P. 56(f) motion requesting

additional time for discovery, Plaintiff has not moved to compel Defendant to produce documents or answer interrogatories, and Plaintiff does not set forth any facts which he must discover to support his claims. Under these circumstances, Plaintiff's last minute complaint of inadequate discovery will not save his claims from summary judgment. Cf. Lawrence, 1995 Westlaw 462235 at *3.

In conclusion, the Court grants Defendant's motion for summary judgment (Docket # 7).

IT IS SO ORDERED.

This 5th day of March, 1996.

Sven Erik Holmes
United States District Judge

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

BRIAN DALE DUBUC,

Plaintiff,

v.

TULSA COUNTY DISTRICT COURT; CLIFFORD E. HOPPER; TIM CLARK; NED TURNBULL; TULSA COUNTY PUBLIC DEFENDER'S OFFICE; PAULA ALFRED; RON WALLACE; JEFF CASH; DARREN CARLOCK; BRIAN FINELY; BRIAN McCLANAHAN; DANNY ELLIOTT; and BILL WARD,

Defendants.

Case No. 94-C-207-H

JUDGMENT

This Court entered an order on March 4, 1996 granting Defendant Ned Turnbull's Motion for Summary Judgment and the Motions to Dismiss of the remaining Defendants.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that judgment is hereby entered for the Defendants and against the Plaintiff.

IT IS SO ORDERED.

This 4TH day of March, 1996.

Sven Erik Holmes
United States District Judge

35

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

BRIAN DALE DUBUC,

Plaintiff,

v.

TULSA COUNTY DISTRICT COURT; CLIFFORD E. HOPPER; TIM CLARK; NED TURNBULL; TULSA COUNTY PUBLIC DEFENDER'S OFFICE; PAULA ALFRED; RON WALLACE; JEFF CASH; DARREN CARLOCK; BRIAN FINELY; BRIAN McCLANAHAN; DANNY ELLIOTT; and BILL WARD,

Defendants.

Case No. 94-C-207-H

ORDER

Before the Court for consideration is the Report and Recommendation of the United States Magistrate Judge (Docket #27) and Plaintiff's Objection to the Report and Recommendation of the United States Magistrate Judge (Docket #29).

When a party objects to the report and recommendation of a Magistrate Judge, Rule 72(b) of the Federal Rules of Civil Procedure provides in pertinent part that:

> [t]he district judge to whom the case is assigned shall make a de novo determination upon the record, or after additional evidence, of any portion of the magistrate judge's disposition to which specific written objection has been made in accordance with this rule. The district judge may accept, reject, or modify the recommendation decision, receive further evidence, or recommit the matter to the magistrate judge with instructions.

Based on a review of the Report and Recommendation of the Magistrate Judge and the Objection thereto, the Court hereby adopts and affirms the Report and Recommendation of the Magistrate Judge.

The Court further finds *sua sponte* that Plaintiff cannot maintain a claim against Defendant Judge Clifford Hopper. Plaintiff alleges that Judge Hopper violated his constitutional rights while presiding at his criminal trial. Thus, Judge Hopper is entitled to absolute judicial immunity. See Stump v. Sparkman, 435 U.S. 349 (1978) (judges are not liable for civil damages for judicial acts).

34

Accordingly, the following motions are hereby granted: Tim Clark's Motion to Dismiss (Docket #10); Jeff Cash, Darren Carlock, Brian Finely, Brian McClanahan, Danny Elliott, and Bill Ward's Motion to Dismiss (Docket #13); Ned Turnbull's Motion for Summary Judgment (Docket #15); Tulsa County's Motion to Dismiss (Docket #17); and Tulsa County Public Defender's Office, Assistant Public Defenders Ron Wallace and Paula Alfred's Motion to Dismiss (Docket #19). The Court further dismisses Plaintiff's claims against Judge Clifford Hopper.

IT IS SO ORDERED.

This 4TH day of March, 1996.

Sven Erik Holmes
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

DUKE'S OFFICE SUPPLY, INC.
an Oklahoma Corporation,

Plaintiff ,

v.

FEDERAL EMERGENCY MANAGEMENT AGENCY, FEDERAL INSURANCE ADMINISTRATION, NATIONAL CON-SERVE, INC.

Defendants.

CIVIL ACTION NO. 95-C-749 H

ORDER

The parties having stipulated that this action shall be dismissed, and the Court being fully advised,

It is therefore ORDERED, ADJUDGED, and DECREED that this action is hereby DISMISSED, with prejudice.

So ORDERED this 1ST DAY OF MARCH, 1996.

S/ SVEN ERIK HOLMES

JUDGE, United States District Court
Northern District of Oklahoma

Distribution:

Fred Rahal, Jr., Esq.
Riggs, Abney, Neal, Turpen & Lewis
Frisco Building
502 West Sixth Street
Tulsa, OK 74119-1010

Phillip Pinnel, Assistant United States Attorney
Northern District of Oklahoma
Page Belcher Building
333 West 4th Street
Tulsa, OK 74103

Jordan S. Fried, Trial Attorney
FEMA, Office of the General Counsel
500 C St., S.W., Room 840
Washington, D.C. 20472

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA,
Plaintiff,

vs.

JANE I. SODERSTROM; JOHN F. SODERSTROM; PAMELA JO HANKINS; UNKNOWN SPOUSE IF ANY OF PAMELA JO HANKINS; COUNTY TREASURER, Creek County, Oklahoma; BOARD OF COUNTY COMMISSIONERS, Creek County, Oklahoma,
Defendants.

Civil Case No. 95-C 980H

ORDER

Upon the Motion of the United States of America, acting on behalf of the Secretary of Housing and Urban Development, by Stephen C. Lewis, United States Attorney for the Northern District of Oklahoma, through Loretta F. Radford, Assistant United States Attorney, and for good cause shown it is hereby **ORDERED** that the Defendant, UNKNOWN SPOUSE IF ANY OF PAMELA JO HANKINS, is dismissed from this action.

Dated this 1ST day of MARCH, 1996.

S/ SVEN ERIK HOLMES

UNITED STATES DISTRICT JUDGE

APPROVED AS TO FORM AND CONTENT:
STEPHEN C. LEWIS
United States Attorney

LORETTA F. RADFORD, OBA #11158
Assistant United States Attorney
333 W. 4th St., Ste. 3460
Tulsa, Oklahoma 74103
(918) 581-7463
LFR:lg

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA, Plaintiff, vs. KELLY JEAN HILL aka Kelly J. Hill; MICAH RAY HILL, BENJAMIN FRANKLIN SAVINGS ASSOCIATION; COUNTY TREASURER, Tulsa County, Oklahoma; BOARD OF COUNTY COMMISSIONERS, Tulsa County, Oklahoma, Defendants.	)	FILED MAR 1 - 1996 Richard M. Lawrence, Clerk U. S. DISTRICT COURT NORTHERN DISTRICT OF OKLAHOMA Civil Case No. 95 C 476H

ORDER

Upon the Motion of the United States of America, acting on behalf of the Department of Housing and Urban Development, by Stephen C. Lewis, United States Attorney for the Northern District of Oklahoma, through Loretta F. Radford, Assistant United States Attorney, and for good cause shown, it is hereby ORDERED that the Judgment of Foreclosure entered herein on the 15th day of November, 1995, and the Notice of sale filed on the 8th day of February, 1996, are vacated, the Marshal Sale now scheduled for March 20, 1996, is canceled, and this action is dismissed without prejudice.

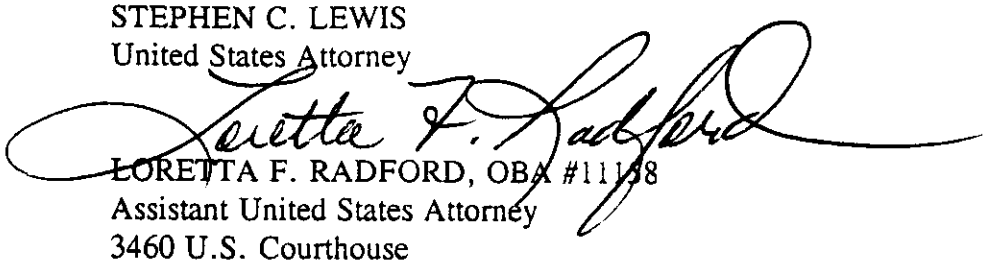
Dated this 1ST day of MARCH, 1996.

S/ SVEN ERIK HOLMES

UNITED STATES DISTRICT JUDGE

APPROVED AS TO FORM AND CONTENT:

STEPHEN C. LEWIS
United States Attorney



LORETTA F. RADFORD, OBA #11158
Assistant United States Attorney
3460 U.S. Courthouse
Tulsa, OK 74103
(918) 581-7463

LFR:flv

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA,

Plaintiff,

vs.

JAMES GEORGE aka James W. George; ANDEARY GEORGE aka Andeary F. George; JIM L. FORTNER; STATE OF OKLAHOMA, ex rel. OKLAHOMA TAX COMMISSION; COUNTY TREASURER, Tulsa County, Oklahoma; BOARD OF COUNTY COMMISSIONERS, Tulsa County, Oklahoma,

Defendants.

Civil Case No. 95 C 613H

JUDGMENT OF FORECLOSURE

This matter comes on for consideration this 1ST day of MARCH, 1996. The Plaintiff appears by Stephen C. Lewis, United States Attorney for the Northern District of Oklahoma, through Loretta F. Radford, Assistant United States Attorney; the Defendants, COUNTY TREASURER, Tulsa County, Oklahoma, and BOARD OF COUNTY COMMISSIONERS, Tulsa County, Oklahoma, appear by Dick A. Blakeley, Assistant District Attorney, Tulsa County, Oklahoma; the Defendant, STATE OF OKLAHOMA, ex rel OKLAHOMA TAX COMMISSION appears by Kim D. Ashley, Assistant General Counsel; and the Defendants, JAMES GEORGE aka James W. George, ANDEARY GEORGE aka Andeary F. George, and JIM L. FORTNER, appear not, but make default.

The Court being fully advised and having examined the court file finds that the Defendant, JAMES GEORGE aka James W. George, signed a Waiver of Summons on July 24, 1995; that the Defendant, ANDEARY GEORGE aka Andeary F. George, signed a

Waiver of Summons on July 24, 1995; that the Defendant, STATE OF OKLAHOMA, ex rel OKLAHOMA TAX COMMISSION, was served a copy of Summons and Complaint on July 6, 1995, by Certified Mail.

The Court further finds that the Defendant, JIM L. FORTNER, was served by publishing notice of this action in the Tulsa Daily Commerce & Legal News, a newspaper of general circulation in Tulsa County, Oklahoma, once a week for six (6) consecutive weeks beginning September 18, 1995, and continuing through October 23, 1995, as more fully appears from the verified proof of publication duly filed herein; and that this action is one in which service by publication is authorized by 12 O.S. Section 2004(c)(3)(c). Counsel for the Plaintiff does not know and with due diligence cannot ascertain the whereabouts of the Defendant, JIM L. FORTNER, and service cannot be made upon said Defendant within the Northern Judicial District of Oklahoma or the State of Oklahoma by any other method, or upon said Defendant without the Northern Judicial District of Oklahoma or the State of Oklahoma by any other method, as more fully appears from the evidentiary affidavit of a bonded abstracter filed herein with respect to the last known address of the Defendant, JIM L. FORTNER. The Court conducted an inquiry into the sufficiency of the service by publication to comply with due process of law and based upon the evidence presented together with affidavit and documentary evidence finds that the Plaintiff, United States of America, acting through the Department of Housing and Urban Development, and its attorneys, Stephen C. Lewis, United States Attorney for the Northern District of Oklahoma, through Loretta F. Radford, Assistant United States Attorney, fully exercised due diligence in ascertaining the true name and identity of the party served by publication with respect to his present or last known place of residence and/or mailing address. The Court accordingly approves and

confirms that the service by publication is sufficient to confer jurisdiction upon this Court to enter the relief sought by the Plaintiff, both as to subject matter and the Defendant served by publication.

It appears that the Defendants, COUNTY TREASURER, Tulsa County, Oklahoma, and BOARD OF COUNTY COMMISSIONERS, Tulsa County, Oklahoma, filed their Answers on July 21, 1995; that the Defendant, STATE OF OKLAHOMA, ex rel. OKLAHOMA TAX COMMISSION, filed its Answer on July 26, 1995; and that the Defendants, JAMES GEORGE aka James W. George, ANDEARY GEORGE aka Andeary F. George and JIM L. FORTNER, have failed to answer and their default has therefore been entered by the Clerk of this Court.

The Court further finds that the Defendant, JAMES GEORGE, is one and the same person as James W. George, and will hereinafter be referred to as "JAMES GEORGE." The Defendant, ANDEARY GEORGE, is one and the same person as Andeary F. George, and will hereinafter be referred to as "ANDEARY GEORGE." The Defendants, JAMES GEORGE and ANDEARY GEORGE, are husband and wife.

The Court further finds that this is a suit based upon a certain mortgage note and for foreclosure of a mortgage securing said mortgage note upon the following described real property located in Tulsa County, Oklahoma, within the Northern Judicial District of Oklahoma:

Lot Four (4), Block Two (2), ORF'S TRACTS ADDITION to the City of Tulsa, Tulsa County, State of Oklahoma, according to the recorded Plat thereof.

The Court further finds that on August 2, 1978, Dortha L. Hopkins, executed and delivered to LIBERTY MORTGAGE COMPANY, her mortgage note in the amount of

$11,650.00, payable in monthly installments, with interest thereon at the rate of Nine and One-Half percent (9½%) per annum.

The Court further finds that as security for the payment of the above-described note, Dortha L. Hopkins, executed and delivered to LIBERTY MORTGAGE COMPANY, a mortgage dated August 2, 1978, covering the above-described property. Said mortgage was recorded on August 4, 1978, in Book 4345, Page 224, in the records of Tulsa County, Oklahoma.

The Court further finds that on October 31, 1987, Liberty Mortgage Company, assigned the above-described mortgage note and mortgage to Universal Savings Bank F.A. of Wisconsin. This Assignment of Mortgage was recorded on December 31, 1987, in Book 5072, Page 1789, in the records of Tulsa County, Oklahoma.

The Court further finds that on February 3, 1989, Universal Savings Bank F.A. of Wisconsin, assigned the above-described mortgage note and mortgage to the SECRETARY OF HOUSING AND URBAN DEVELOPMENT of Washington, D.C., his successors and assigns. This Assignment of Mortgage was recorded on February 7, 1989, in Book 5165, Page 1693, in the records of Tulsa County, Oklahoma.

The Court further finds that Defendants, JAMES GEORGE and ANDEARY GEORGE, currently hold title to the property by virtue of a General Warranty Deed, dated May 27, 1987, recorded on May 29, 1987, in Book 5026, Page 1550, in the records of Tulsa County, Oklahoma, and are the current assumptors of the subject indebtedness.

The Court further finds that on December 27, 1989, the Defendants, JAMES GEORGE and ANDEARY GEORGE, entered into an agreement with the Plaintiff lowering

the amount of the monthly installments due under the note in exchange for the Plaintiff's forbearance of its right to foreclose.

The Court further finds that the Defendants, JAMES GEORGE and ANDEARY GEORGE, made default under the terms of the aforesaid note and mortgage, as well as the terms and conditions of the forbearance agreement, by reason of their failure to make the monthly installments due thereon, which default has continued, and that by reason thereof the Defendants, JAMES GEORGE and ANDEARY GEORGE, are indebted to the Plaintiff in the principal sum of $17,154.47, plus interest at the rate of 9½ percent per annum from February 1, 1995 until judgment, plus interest thereafter at the legal rate until fully paid, and the costs of this action.

The Court further finds that the Defendant, COUNTY TREASURER, Tulsa County, Oklahoma, has a lien on the property which is the subject matter of this action by virtue of personal property taxes in the amount of $1.00 which became a lien on the property as of June 26, 1992, a lien in the amount of $1.00 which became a lien on the property as of June 25, 1993 and a lien in the amount of $1.00 which became a lien on the property as of June 23, 1994. Said liens are inferior to the interest of the Plaintiff, United States of America.

The Court further finds that the Defendant, STATE OF OKLAHOMA, ex rel. OKLAHOMA TAX COMMISSION, has a lien on the property which is the subject matter of this action by virtue of state income taxes in the amount of $319.57, plus accrued and accruing interest, which became a lien on the property as of January 31, 1989. Said lien is inferior to the interest of the Plaintiff, United States of America.

The Court further finds that the Defendants, JAMES GEORGE, ANDEARY GEORGE, and JIM L. FORTNER, are in default, and have no right, title or interest in the subject real property.

The Court further finds that the Defendants, BOARD OF COUNTY COMMISSIONERS, Tulsa County, Oklahoma, claims no right, title or interest in the subject real property.

The Court further finds that pursuant to 12 U.S.C. 1710(1) there shall be no right of redemption (including in all instances any right to possession based upon any right of redemption) in the mortgagor or any other person subsequent to the foreclosure sale.

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that the Plaintiff, the United States of America, acting on behalf of the Secretary of Housing and Urban Development, have and recover judgment In Rem against the Defendants, JAMES GEORGE and ANDEARY GEORGE, in the principal sum of $17,154.47, plus interest at the rate of 9½ percent per annum from February 1, 1995 until judgment, plus interest thereafter at the current legal rate of 5.25 percent per annum until paid, plus the costs of this action, plus any additional sums advanced or to be advanced or expended during this foreclosure action by Plaintiff for taxes, insurance, abstracting, or sums for the preservation of the subject property.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Defendant, COUNTY TREASURER, Tulsa County, Oklahoma, have and recover judgment in the amount of $3.00, plus costs and interest, for personal property taxes for the years 1991, 1992 and 1993, plus the costs of this action.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Defendant, STATE OF OKLAHOMA, ex rel. OKLAHOMA TAX COMMISSION, have and

recover judgment In Rem in the amount of $319.57, plus accrued and accruing interest, for state income taxes, plus the costs.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Defendants, BOARD OF COUNTY COMMISSIONERS, Tulsa County, Oklahoma, JAMES GEORGE, ANDEARY GEORGE and JIM L. FORTNER, have no right, title, or interest in the subject real property.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that upon the failure of said Defendants, JAMES GEORGE and ANDEARY GEORGE, to satisfy the judgment In Rem of the Plaintiff herein, an Order of Sale shall be issued to the United States Marshal for the Northern District of Oklahoma, commanding him to advertise and sell according to Plaintiff's election with or without appraisement the real property involved herein and apply the proceeds of the sale as follows:

First:

In payment of the costs of this action accrued and accruing incurred by the Plaintiff, including the costs of sale of said real property;

Second:

In payment of the judgment rendered herein in favor of the Plaintiff;

Third:

In payment of the Defendant, STATE OF OKLAHOMA, ex rel. OKLAHOMA TAX COMMISSION, in the

amount of 319.57, plus accrued and accruing interest, for state income taxes due.

Fourth:

In payment of Defendant, COUNTY TREASURER, Tulsa County, Oklahoma, in the amount of $3.00, personal property taxes which are currently due and owing.

The surplus from said sale, if any, shall be deposited with the Clerk of the Court to await further Order of the Court.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that pursuant to 12 U.S.C. 1710(1) there shall be no right of redemption (including in all instances any right to possession based upon any right of redemption) in the mortgagor or any other person subsequent to the foreclosure sale.

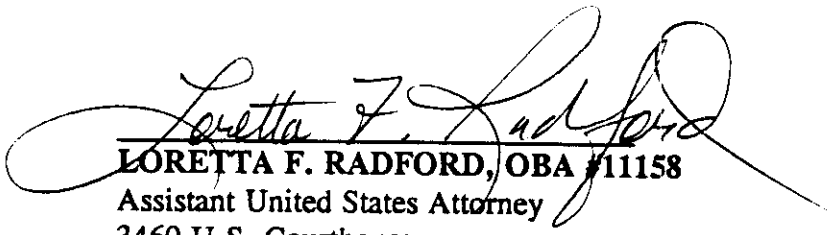
IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that from and after the sale of the above-described real property, under and by virtue of this judgment and decree, all of the Defendants and all persons claiming under them since the filing of the Complaint, be and they are forever barred and foreclosed of any right, title, interest or claim in or to the subject real property or any part thereof.

S/ SVEN ERIK HOLMES

UNITED STATES DISTRICT JUDGE

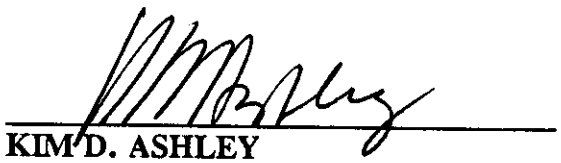
APPROVED:

STEPHEN C. LEWIS
United States Attorney



LORETTA F. RADFORD, OBA #11158
Assistant United States Attorney
3460 U.S. Courthouse
Tulsa, Oklahoma 74103
(918) 581-7463

DICK A. BLAKELEY, OBA #852
Assistant District Attorney
406 Tulsa County Courthouse
Tulsa, Oklahoma 74103
(918) 596-4842
Attorney for Defendants,
County Treasurer and
Board of County Commissioners,
Tulsa County, Oklahoma



KIM D. ASHLEY
Assistant General Counsel
P.O. Box 53248
Oklahoma City, OK 73152-3248
(405) 521-3141
Attorney for Defendant,
State of Oklahoma, ex rel.
Oklahoma Tax Commission

Judgment of Foreclosure
Civil Action No. 95 C 613H

LFR:flv

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

RANDELL NELSON,

Plaintiff,

v.

DELORES RAMSEY, et al.,

Defendants.

Case No. 95-C-321-K

REPORT AND RECOMMENDATION OF U. S. MAGISTRATE JUDGE

This report and recommendation pertains to Plaintiff's Civil Rights Complaint Pursuant to 42 U.S.C. § 1983 (Docket #1), the Motion to Dismiss/Motion for Summary Judgment on Behalf of Defendants Canfield, Ramsey, and the Division II Probation and Parole Office (Docket #7), the Report of Review of Factual Basis of Claims Asserted in Civil Rights Complaint Pursuant to U.S.C. Section 1983 ("Report") (Docket #8), Plaintiff's Motion for Summary Judgment (Docket #10), and Defendants' Response to Plaintiff's Motion for Summary Judgment (Docket #11).

Plaintiff is an inmate at the Howard McLeod Correctional Center in Farris, Oklahoma. He alleges that defendants violated his due process rights during prison disciplinary proceedings which led to his removal from the Pre-Parole Conditional Supervision (PPCS) program. He seeks declaratory judgment, compensatory damages, and punitive damages. He asks the court to expunge the misconduct report he received from the Department of Corrections and restore all rights he lost as a result.

The court notes that pro se complaints are held "to less stringent standards than formal pleadings drafted by lawyers." Haines v. Kerner, 404 U.S. 519, 520 (1972). A court may dismiss a complaint if "the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." Id. at 521 (quoting Conley v. Gibson, 355 U.S. 41, 45-46 (1957)). Thus, "if the court can reasonably read the pleadings to state a valid claim on which the plaintiff could prevail, it should do so despite the plaintiff's failure to cite proper legal authority, his confusion of various legal theories, his poor syntax and sentence construction, or his unfamiliarity with pleading requirements." Hall v. Bellmon, 935 F.2d 1106, 1110 (10th Cir. 1991).

A prisoner may use Section 1983 to correct constitutionally defective parole procedures. Herrera v. Harkins, 949 F.2d 1096, 1097 (10th Cir. 1990). However, a prisoner challenging present confinement and alleging a constitutional defect in an individual parole hearing, who is seeking a new parole hearing, must file a habeas petition. Id. Plaintiff does not contend that the procedures in place were constitutionally defective, but that those procedures were not properly followed, and that a different result should follow from the application of those procedures to his case. Consequently, his requests for declaratory and injunctive relief must be denied.[1]

---

[1] The court notes that the Oklahoma Supreme Court has held in a similar case filed under the habeas statute that those who are in the PPCS program are still incarcerated. Barnett v. Moon, 852 P.2d 161, 162 (Okla. Crim. App. 1993), "[P]re parole is by definition not parole, but a preparatory status to parole itself. And since 'parole' means release from jail, prison or other confinement after actually serving part of a sentence, logically pre parole means before such release." The court also held that an inmate who was removed from Oklahoma's PPCS program was entitled only to the due process requirements of Wolff, 418 U.S. 564-573. "Due process in these matters requires advance written notice of the claimed violation; a written statement of the factfinders as to the evidence relied on and

Plaintiff has sued Julie Canfield, his parole officer; the Division II Probation and Parole Office; Delores Ramsey, Director of the Department of Corrections; the Oklahoma Department of Corrections; and the State of Oklahoma for damages. A state and its agencies are entitled to immunity from suit under the Eleventh Amendment for actions brought in federal courts, whether the action seeks damages or equitable relief, unless that state has waived its immunity. Papasan v. Allain, 478 U.S. 265, 276 (1986); Kentucky v. Graham, 473 U.S. 159, 167 n. 14 (1985). The State of Oklahoma has not expressly waived its Eleventh Amendment immunity and therefore is immune from suit, as are the probation and parole offices. Nichols v. Department of Corrections, 631 P.2d 746, 749-750 (Okla. 1981).

Defendant Delores Ramsey, the Director of the Department of Corrections, is immune from a suit for damages in her official capacity. The courts have held that a suit

---

reason for the disciplinary action taken; and, unless good cause exists, an opportunity to call witnesses and present evidence should be afforded." Barnett, 852 P.2d at 163.

The Report of Review of Factual Basis of Claims Asserted in Civil Rights Complaint Pursuant to U.S.C. Section 183 (Docket #8) ("Special Report") indicates, and plaintiff does not contest, that plaintiff was afforded the due process which Wolff requires. His signature on the Offense Report shows that he received written notice of the specific charge against him on January 5, 1995. (Special Report, Docket #8, Attachment H, p. 2, 3). He received an opportunity to present evidence and witness testimony at the hearing on January 12, 1995. (Special Report, Attachment H, p. 1, 3). He also received a written statement of the evidence relied on and a statement of the reasons for the punishment selected. (Special Report, Attachment H, p. 1). The decision was based on his own admission of failure to comply with the case plan to which he had agreed. The case plan is shown as Attachment F to the Special Report.

It is clear that plaintiff cannot prevail on his claims even if he files a habeas petition.

against a state official in his or her official capacity is, in fact, a suit against the state itself. The Supreme Court stated in Kentucky, 473 U.S. at 165, "[o]fficial-capacity suits, in contrast [to personal capacity suits], 'generally represent only another way of pleading an action against an entity of which an officer is an agent'" (quoting Monell v. N.Y. City Dept. of Social Services, 436 U.S. 658, 690 n. 55 (1978)). In Will v. Michigan Dept. of State Police, 491 U.S. 58, 71 (1989), the Supreme Court found that an official acting in his official capacity is not a "person" within the meaning of § 1983 and is immune from suit by operation of the Eleventh Amendment. See also, Ruark v. Solano, 928 F.2d 947, 950 (10th Cir. 1991).

The Disciplinary Procedures included in Exhibit "H" to the Report show that any prison staff member may complete an offense report if he or she has a belief that a prisoner has violated prison rules. The report is accepted and signed by a supervisor and referred for investigation by an investigator. A hearing is then scheduled and the hearing officer hears the witnesses, examines the evidence, and renders a decision. Under the procedural rules, the persons who prepare the offense report and accept it cannot serve as the investigator or hearing officer.

Plaintiff alleges that his due process rights were violated when his former parole officer, Birdie Martinka, sat as the hearing officer at his disciplinary hearing. However, the evidence shows that Dana Ballard signed the report as hearing officer (Exhibit "H" to Report). In Morrissey v. Brewer, 408 U.S. 471, 485 (1972), the court examined the minimal due process requirements for preliminary parole revocation proceedings, concluding that "due process requires that after the arrest, the determination that

reasonable ground exists for revocation of parole should be made by someone not directly involved in the case." The court recognized that the failure of a parolee is in a sense a failure for his supervisor who is his counselor and confidant. Id. "The officer directly involved in making recommendations cannot always have complete objectivity in evaluating them. Id. at 485-86. Thus an "independent decisionmaker" should decide if a parole violation has occurred. Id. at 486.

In Wolff v. McDonnell, 418 U.S. 539, 571-72 (1974), the court examined a prison's procedures to award and take away prisoners' good-time credits and declined to find that a review committee made up of an associate prison warden and two other prison directors could not be impartial. The court noted that a corrections supervisor not on the committee referred cases to the committee after an investigation and interview with the inmates involved and the committee was not left with unlimited discretion but had to follow specific regulations.

Even assuming that plaintiff's allegations are true and his former parole officer acted as the disciplinary hearing officer, plaintiff has not brought suit against either Birdie Martinka or Dana Ballard, those who allegedly were personally involved in this violation of his rights, so the court cannot consider the claim.

Defendants Julie Canfield and Delores Ramsey also cannot be held liable in their individual capacities. The Supreme Court in Davis v. Scherer, 468 U.S. 183, 194 (1984), held that a state official has qualified immunity and cannot be held liable in damages under § 1983 unless the constitutional right alleged to have been violated was clearly established at the time of the violation.

Plaintiff's only claim against defendant Julie Canfield is that her "active participation in the events leading to the offense compromised the ability to function objectively" and prohibited her from signing, as the accepting staff member, the offense report, or appearing as a witness, according to Policy 060125-I.B.3. (Attachment "H" to Special Report, Docket #8). However, the policy only prohibits a staff person with direct involvement in a disciplinary case from serving as the hearing officer, investigator, or staff representative. There is absolutely no case law that suggests that parole officers cannot accept reports from others of possible parole violations or appear as witnesses in parole violation proceedings. Attachment "F" and "H" to the Special Report and Plaintiff's Complaint show that he was clearly aware of his parole stipulations, which were to complete eight hours of community service a week until 100 hours were completed and to attend three AA/NA meetings a week, and that he did not perform those stipulations.

Plaintiff suggests that the court follow the "functional approach" used in Fuss v. Uppah, 972 F.2d 300 (10th Cir. 1992), in determining whether defendant Canfield has immunity in this case. In that case, the court concluded that the prisoner's parole officer did not have qualified immunity, because the allegations that the officer had had him held without a charge and then presented false information in order to have parole revoked would constitute violations of the prisoner's rights. Plaintiff's claims against Canfield, even if true, would not constitute violations of his constitutional rights.

Plaintiff's only claim against defendant Delores Ramsey is that she did not consider the "jurisdictional issue" when she ruled on his appeal. Under the Disciplinary Procedures, it is clear that Ms. Ramsey as the Facility Director properly made the final decision

concerning plaintiff's appeal under Policy OP-060125-IIB1 and IIB2. Jurisdiction relates to the authority of courts and judicial officers to decide cases and is inapplicable to the proceedings within a correctional facility concerning disciplinary matters. Plaintiff's claim against Ramsey does not constitute a violation of any constitutional right.

In summary, Defendant's Motion for Summary Judgment (Docket #7) should be granted and Plaintiff's Motion for Summary Judgment (Docket #10) should be denied.

Plaintiff's complaint pursuant to 42 U.S.C. § 1983 should be dismissed. Pursuant to 28 U.S.C. § 636(b)(1)(C), the parties are given ten (10) days from the above filing date to file any objections with supporting brief to these findings and recommendations. Failure to object within that time period will result in waiver of the right to appeal from a judgment of the district court based upon the findings and recommendations of the Magistrate Judge.

Dated this 4th day of March, 1996.

JOHN LEO WAGNER
UNITED STATES MAGISTRATE JUDGE

T:ramsey.rr

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA
IN RE ASBESTOS PRODUCTS LIABILITY LITIGATION (NO. VI)
MDL NO. 875

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

JAMES L. PATTON and JANET PATTON)
)
Plaintiffs,)
)
v.) No. 95-C-803-K
)
CAPE, plc, et al.,)
)
Defendants.)

STIPULATION OF DISMISSAL WITHOUT PREJUDICE

Plaintiffs James L. Patton and Janet Patton, Plaintiffs' attorneys, Owens-Illinois, Inc. and Owens-Illinois, Inc.'s attorneys stipulate and agree that Plaintiffs' cause of action against Owens-Illinois, Inc. has been dismissed as to Owens-Illinois, Inc. only, and Plaintiffs' cause of action against Owens-Illinois, Inc. be, and the same hereby is, dismissed without prejudice with each party to bear its own costs.

39

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

MARKIE K. GARNER)
)
Plaintiff,)
)
vs.) No. 95-C-36-BU
)
LARRY FIELDS, et al.,)
)
Defendants.)

JUDGMENT

In accord with the Order granting Defendants' motion for summary judgment, the Court hereby **enters judgment** in favor of all Defendants and against Plaintiff Markie Garner on his failure to protect claim. Plaintiff shall take nothing on his claim. Each side is to pay its respective **attorney fees.**

SO ORDERED THIS 1st day of March, 1996.

Michael Burrage

MICHAEL BURRAGE
UNITED STATES DISTRICT JUDGE

46

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

WM. ERIC CULVER, et al.,

Plaintiffs,

v.

CAROL M. BROWNERS, as Administrator of the U.S. Environmental Protection Agency, et al.,

Defendants.

Case No. 95-C-1039-K

EOD 3/4/96

REPORT AND RECOMMENDATION AND ORDER OF U. S. MAGISTRATE JUDGE

This report and recommendation and order pertains to Plaintiffs' Complaint and Verified Petition for a Permanent Injunction and Application for Preliminary Injunction (Docket #1), which challenges the propriety of actions taken by the defendants in planning, designing, and constructing a four-lane extension of U.S. Highway 169 in northeastern Oklahoma traversing the Caney River and a large wetland area; the Federal Defendants' Motion to Limit Review to the Administrative Record and for a Protective Order Prohibiting Discovery (Docket #12); the Federal Defendants' Motion to Stay Answer Date and Discovery Pending Consideration of Motion to Limit Review to Record (Docket #14); Plaintiffs' Response to Federal Defendants' Motion to Limit Review to the Administrative Record and for a Protective Order Prohibiting Discovery (Docket #23); Plaintiffs' Response to Defendants' Motion to Stay Answer Date and Discovery (Docket #25); Defendant Crowley's Motion for Order Defining Scope of Judicial Review and Prohibiting or Limiting Discovery, and Request for Order Staying Current Discovery Requests (Docket #26); Plaintiffs' Response to Defendant Crowley's Motion for Order

42

Defining Scope of Judicial Review and Prohibiting or Limiting Discovery, and Request for Order Staying Current Discovery Requests and Motion to Compel Answers to Interrogatories (Docket #30); the United States' Reply in Further Support of its Motion to Limit Review to the Administrative Record and for a Protective Order Prohibiting Discovery and its Motion to Stay Answer Date and Discovery (Docket #33); Defendant Crowley's Response to Plaintiffs' Motion to Compel Answers to Interrogatories and Request for Admissions (Docket #35); Plaintiffs' Supplemental Response to United States' Motion to Limit Review to the Administrative Record and for a Protective Order Prohibiting Discovery (Docket #36); and Plaintiffs' Motion to Set Hearing, and in the Alternative, Application for Temporary Restraining Order (Docket #37). Hearings were held on February 22 and 27, 1996 and oral arguments were heard.

ORDER

The Federal Defendants' Motion to Limit Review to the Administrative Record and for a Protective Order Prohibiting Discovery (Docket #12) is granted. Plaintiffs contend that the government defendants commenced the road project without preparing an environmental impact statement ("EIS"), as required by the National Environmental Policy Act, 42 U.S.C. §§ 4321 et seq. ("NEPA"), and meeting other NEPA requirements and without meeting the requirements of Section 404 of the Clean Water Act, 33 U.S.C. § 1344. Instead, the project has proceeded under a Finding of No Significant Impact ("FONSI") and environmental assessment.

Judicial review of these claims is governed by the Administrative Procedure Act, 5 U.S.C. §§ 701 et seq. and must be processed as an appeal with review limited to the

administrative record of the final agency decision. Marsh v. Oregon Natural Resources Council, 490 U.S. 360, 377 (1989); Olenhouse v. Commodity Credit Corp., 42 F.3d 1560, 1580 (10th Cir. 1994); Holy Cross Wilderness Fund v. Madigan, 960 F.2d 1515, 1521 (10th Cir. 1992); Village of Los Ranchos De Albuquerque v. Marsh, 956 F.2d 970, 972 (10th Cir.), cert. denied, 506 U.S. 817 (1992). The court is to determine "(1) whether the agency acted within the scope of its authority, (2) whether the agency complied with prescribed procedures, and (3) whether the action is otherwise arbitrary, capricious or an abuse of discretion." Olenhouse, 42 F.3d at 1574. The court will review the administrative record to determine "if the agency considered relevant factors or articulated a reasoned basis for its conclusions." Id. at 1580.

Because the court will examine only the record before the agency at the time its decision was made, extra-record discovery requests are not proper. The plaintiffs are prohibited from serving any additional interrogatories, document production requests, and requests for admission on plaintiffs, and plaintiffs are not required to respond to those previously served.

The Federal Defendants' Motion to Stay Answer Date and Discovery Pending Consideration of Motion to Limit Review to Record (Docket #14) is granted. The date to answer plaintiffs' complaint was stayed at the hearing on February 22, 1996. Defendants will not be required to answer because the court will review only the administrative record in reaching a decision.

Defendant Crowley's Motion for Order Defining Scope of Judicial Review and Prohibiting or Limiting Discovery, and Request for Order Staying Current Discovery

Requests (Docket #26) is granted. As previously stated, the court will examine only the agency record in deciding this case, so extra-record discovery requests are not proper. If the court determines at a later date that some discovery is warranted, it will issue an order allowing discovery as to the particular issues involved. The request for default judgments against certain defendants based on failure to timely answer or respond to requests is denied. No admissions have been made by the parties' actions.

Plaintiffs' Motion to Compel Answers to Interrogatories (Docket #30) is denied. Discovery of information outside the administrative record is not appropriate at this time.

The United States' Motion for a Protective Order Prohibiting Discovery and its Motion to Stay Answer Date and Discovery (Docket #33) is also granted for the reasons stated above.

REPORT AND RECOMMENDATION

Plaintiffs' Application for a Preliminary Injunction in the Complaint (Docket #1) should be denied. Plaintiff's Application for a Temporary Restraining Order should be found moot, as the Temporary Restraining Order was only requested in the event that the Preliminary Injunction Hearing could not be timely conducted.

Plaintiffs seek injunctive relief to preserve the status quo and prevent further degradation to the environment pending a final determination of the parties' rights and to require the defendants to refrain from further construction activities which would tend to worsen the damages until appropriate review is undertaken, as mandated by NEPA. The request for hearing on the Preliminary Injunction was prompted by the fact that steel was to be delivered to commence the building of bridges on March 3, 1996.

The factors which must be present in order for a preliminary injunction or temporary restraining order to issue are (1) a substantial likelihood that the movants will prevail on the merits, (2) a showing that the movants will suffer irreparable injury unless the injunction issues, (3) a showing that the threatened injury to the movants outweighs whatever damage the proposed injunction may cause the opposing parties, and (4) a showing that the injunction, if issued, would not be adverse to the public interest. SCFC ILC, Inc. v. Visa USA, Inc., 936 F.2d 1096, 1098 (10th Cir. 1991) (quoting Otero Savings and Loan Ass'n, 665 F.2d 275, 278 (10th Cir. 1981); Smith v. Soil Conservation Service, 563 F. Supp. 843, 844 (W.D. Okla. 1982).

Plaintiffs have failed to show a substantial likelihood that they will prevail on the merits. A clear violation of NEPA has not been shown to this court's satisfaction. There are substantial factual issues surrounding the environmental impact of the roadbed construction to date, and the likely impact of the project once completed as designed. The motion for hearing on Plaintiff's request for a preliminary injunction was presented to the court under "emergency" circumstances. As a threshold showing, it is incumbent on the Plaintiffs to demonstrate a significant existent or impending environmental impact that was not considered during the administrative proceedings. Once such an impact is demonstrated to the satisfaction of the court, the administrative record can be reviewed to assess whether the impact was considered, and if it was not, why not. If such an impact was not considered because of a lack of adherence to mandated procedures, or if it was arbitrarily or capriciously neglected or deliberately ignored so as to constitute an abuse of discretion, the court should grant relief. However, here the Plaintiffs have failed to make

the threshold showing. The administrative record clearly addresses the "permanent loss" of 13.8 acres of wetlands, and the Plaintiff's proof focused on increased upstream flooding. There is little doubt but that on one occasion such flooding did occur, but the cause of such flooding was attributed to the roadbed fill in place, or perhaps to the temporary construction roads that admittedly had insufficient culverts at that time. There is no proof that the construction of the bridges, (which is what Plaintiffs seek to enjoin), would add to this flooding, and defense counsel argue that the increased span included in the design of the bridges would, in all likelihood, actually decrease the upstream flooding.

At the hearing, plaintiffs offered two witnesses, Frank Sanders and Louis Trager, Jr., who testified about the upstream flooding. Mr. Trager provided a videotape of flooding in the area adjacent to the construction site on May 8, 1995. He admitted that there had been flooding in that location at least six times in past years.

A geologist, Dr. Murray McComas, testified that he had reviewed the administrative record, aerial maps, Army Corps of Engineers topographic maps, U.S. Geological Survey maps, and materials produced for discovery purposes by the Oklahoma Department of Transportation and determined that only alternative routes to the north and south, not alternative designs, that would have had less impact on the wetlands, had been considered for the project. The road is being built on impermeable fill which is already in place. Mr. McComas stated that other designs would have allowed the water to drain, such as elevating the roadway on piles to allow water to pass underneath, building it on a porous rockbed, and placing culverts under the road.

Mr. McComas stated that he saw no evidence of an environmental assessment done

on the impact of the entire project, but only a study of the impact of the 13.8 acres of fill. He testified that no effort was made to avoid intruding on the wetlands and no attempt was made to mitigate any damage done by correcting flow loss, restoration of wetlands, or construction of manmade wetlands.

Mr. McComas claimed that the Corps of Engineers did not comply with the Memorandum of Agreement (Plaintiffs' Exhibit #3), related to mitigation of Clean Water Act projects, to mitigate by "sequencing," which includes avoiding adverse impact, minimizing impact which cannot be avoided, compensating for negative impact, or purchasing affected property. He testified that there was a loss of wetlands and secondary impact, including flooding upstream, degradation downstream, loss of prime agricultural land, and loss of trees.

Plaintiffs' counsel argued at the hearing that the Corps of Engineers did not follow NEPA standards in analyzing the environmental impact of the road work. He contends that the scope of analysis of the Corps should have been the impact of the entire project, since federal funding was involved, but only the impact of the "footprint" of the 13.8 acres of deposit of fill was reviewed. Plaintiffs say that the decision document developed by the Corps examined the entire project in determining benefits, but not detriments. They criticize the mitigation method employed by the Corps, saying they did not use the sequencing approach to attempt to avoid a negative impact, minimize it, or rectify it before merely purchasing preexisting wetlands for preservation. Finally, they claim that the public notice of the project was insufficient, as it included no mitigation plan and did not mention secondary affects of the use of the "wick drain" system and fill/borrow pit, such as

upstream flooding, downstream degradation, and alteration of the course of the Caney River. Significantly, Plaintiffs stated that they did not oppose the route selected for the roadway and agreed the work would increase the safety of the public.

Defendants' counsel argued that plaintiffs had not presented evidence of any of the elements required for a preliminary injunction except damages, and these damages can be compensated monetarily. Counsel contended that no irreparable harm was shown and that plaintiffs will not succeed on the merits of their case because under the APA, the court can not overturn agency action unless it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A).

A reviewing court may not base its judgment on whether it would have made an administrative decision differently. Kleppe v. Sierra Club, 427 U.S. 390, 410, n. 21 (1976). The court's only role is to determine whether "the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment." Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, 416 (1971). "[T]he ultimate standard of review is a narrow one. The court is not empowered to substitute its judgment for that of the agency." Id. The Supreme Court has concluded that, once an agency has made a decision subject to NEPA's procedural requirements, "the only role for a court is to insure that the agency has considered the environmental consequences; it cannot 'interject itself within the area of discretion of the executive as to the choice of the action to be taken.'" Strycker's Bay Neighborhood Council, Inc. v. Karlen, 444 U.S. 223, 227-28 (1980) (quoting Kleppe v. Sierra Club, 427 U.S. 390, 410, n. 21 (1976)).

The defendants argue that the Corps fully complied with all applicable laws and

regulations in issuing the permit to begin road work, took the "hard look" required by NEPA, conducted a full, complete environmental assessment including areas outside the "footprint" of the fill material, considered all alternatives and secondary impacts, and made a proper mitigation decision. Defendants point out that plaintiffs did not present their preferred alternative, that the roadway design be changed to "span" the wetlands by use of pilings or a large bridge, during the public notice and comment period. In fact, all the comments received were favorable to the project as designed and no commentor requested a public hearing.

Defendants also claim that the balance of the equities in this case strongly favors them, since plaintiffs' alleged injuries will not be exacerbated by continuing with the bridge construction since the fill is already in place, but the cost to the taxpayers if an injunction should issue is substantial. Defendants submit three affidavits of persons involved in the project, Jack Steward, an Office and Division Engineer of the Oklahoma Department of Transportation ("ODOT"), Byron Poynter, a Construction and Division Engineer of ODOT, and Raymond Flatt, General Manager of V.J. Enterprises, Inc., which is constructing part of the project. They state that ODOT will incur hundreds of thousands of dollars in costs for materials ordered for the project, delay damages, and demobilization costs if the project does not go forward.

Defendants contend that an injunction would be adverse to the public interest. It will delay an important highway project undertaken to enhance public safety and cost the taxpayers of Oklahoma a substantial amount. In contrast, the alleged harm to plaintiffs is speculative and compensable by money damages through state court action.

Plaintiffs have not shown irreparable harm from allowing construction to go forward. The only evidence provided to the court is that bottomland has been repeatedly flooded over the years and increased flooding was caused by the temporary placement of the construction road. The court is not convinced that the road as designed once completed will result in increased flooding, and no testimony has been given in this regard. Neither the route nor the need for bridges have been contested by plaintiffs. In addition, any harm done to plaintiffs' property is compensable in money damages.

Plaintiffs have also failed to show that the balance of hardship tilts in their favor. Plaintiffs will incur no hardship except what they have sustained historically while living in bottomlands located near a river. On the other hand, there is agreement that the public needs a safer route for travel. Also, the financial costs to taxpayers of delaying the project are immense. The public interest in safety concerns and efficient expenditure of public funds will be advanced if work continues and hurt if the preliminary injunction is granted.

In summary, the Federal Defendants' Motion to Limit Review to the Administrative Record and for a Protective Order Prohibiting Discovery (Docket #12) is granted; the Federal Defendants' Motion to Stay Answer Date and Discovery Pending Consideration of Motion to Limit Review to Record (Docket #14) is granted; Defendant Crowley's Motion for Order Defining Scope of Judicial Review and Prohibiting or Limiting Discovery, and Request for Order Staying Current Discovery Requests (Docket #26) is granted; Plaintiffs' Request for Order Staying Current Discovery Requests and Motion to Compel Answers to Interrogatories (Docket #30) is denied; the United States' Motion for a Protective Order Prohibiting Discovery and its Motion to Stay Answer Date and Discovery (Docket #33) is

granted; and it is recommended that Plaintiffs' Application for a Preliminary Injunction should be denied and Plaintiff's Application for Temporary Restraining Order should be found moot, as the hearing on Plaintiff's Application for a Preliminary Injunction was timely conducted.

The parties will have ten days from the date of this order to object to the Report and Recommendation of the United States Magistrate Judge.

Dated this 1st day of March, 1996.

JOHN LEO WAGNER
UNITED STATES MAGISTRATE JUDGE

T:culver.rr2

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

JAMES VANDIVERE,

Plaintiff,

v.

UNITED STATES OF AMERICA; DEPARTMENT OF HEALTH AND HUMAN SERVICES; GENERAL SERVICES ADMINISTRATION; CREEK NATION; and PUBLIC HEALTH SERVICE,

Defendant.

Case No. 95-C-44-H

ORDER

This matter comes before the Court on Defendant's Motion to Dismiss or, in the Alternative, for Partial Summary Judgment or, in the Alternative, to Reduce Plaintiff's Ad Damnum Clause (Docket #12).

Plaintiff brought this action following an automobile accident involving Plaintiff and an employee of the United States Government who was traveling on official business. Defendants filed this motion on August 29, 1995. Plaintiff has failed to file a response to Defendant's motion. In fact, Plaintiff has not filed anything in this matter since May 3, 1995.

Rule 41(b) of the Federal Rules of Civil Procedure provides:

> For failure of the plaintiff to prosecute or to comply with these rules or any order of court, a defendant may move for dismissal of an action or of any claim against the defendant. Unless the court in its order for dismissal otherwise specifies, a dismissal under this subdivision and any dismissal not provided for in this rule, other than a dismissal for lack of jurisdiction, for improper venue, or for failure to join a party under Rule 19, operates as an adjudication upon the merits.

In interpreting Rule 41(b), courts have consistently recognized that "the federal trial courts do have the inherent power to dismiss, sua sponte, a plaintiff's action for failure to prosecute." Oklahoma

13

Publishing Co. v. Powell, 1980 WL 6687 (10th Cir. 1980) (citing Link v. Wabash R.R. Co., 370 U.S. 626 (1962)).

The Court hereby dismisses this action without prejudice.

IT IS SO ORDERED.

This 15th day of March, 1996.

Sven Erik Holmes
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

IN RE:	)	
	)	NO. 92-CV-62-H
ASBESTOS LITIGATION,	)	
	)	
ROSALIE G. CLARK, Individually, and as Surviving Spouse and Next of Kin of LOUIS O. CLARK, Deceased.	)	

ORDER

COMES NOW the Court having considered Plaintiff's Dismissal with Prejudice and it appearing that all parties have fully and finally settled their disputes,

IT IS, THEREFORE, ORDERED that the above-captioned action be dismissed with prejudice as to all remaining claims of Plaintiff as to all remaining Defendants with the parties to bear their own costs and attorney fees. This case against the bankrupt defendants, Celotex, Eagle-Picher, H. K. Porter, and Raymark have previously been severed and administratively closed and Plaintiff has made a prior administrative claim submission to Flintkote.

United States District Court Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

MARK HOUSTON WHATLEY,

Plaintiff,

v.

CITY OF BARTLESVILLE, OKLAHOMA, a municipal corporation; THOMAS R. HOLLAND, former Chief of Police; and ROBERT E. METZINGER, City Manager,

Defendants.

Case No. 95-C-153-H

ORDER

This matter comes before the Court on the Motion to Dismiss, or in the Alternative, Motion for Summary Judgment of Defendant City of Bartlesville ("City")(Docket #10).[1]

Mr. Whatley, a former Bartlesville police officer, brought this action pursuant to 42 U.S.C. § 1983, asserting that the City and the individual defendants deprived him of property and liberty interests in connection with his termination. Claiming that Mr. Whatley has failed to allege a violation of his due process rights, the City filed this motion.

I.

To prevail on a motion to dismiss, a defendant must establish that there is no set of circumstances upon which the plaintiff would be entitled to relief. Jenkins v. McKeithen, 395 U.S. 411 (1969); Ash Creek Mining Co. v. Lujan, 969 F.2d 868, 870 (10th Cir. 1992). For the purposes

[1]The Motion to Dismiss , or in the Alternative, Motion for Summary Judgment was filed on behalf of all defendants. In an order entered August 23, 1995, the Court granted in part the motion to dismiss as it related to the individual defendants. The Motion regarding the City was taken under advisement at that time.

31

of this analysis, the Court accepts as true all material allegations in the complaint. Ash Creek Mining, 969 F.2d at 870.

If, as in this case, a court looks outside the pleadings, the motion to dismiss should be converted to a motion for summary judgment, in which case a court views the evidence submitted in the light most favorable to the nonmoving party. Celotex, 477 U.S. at 324; Boren v. Southwestern Bell Tel. Co., 933 F.2d 891, 892 (10th Cir. 1991). Nonetheless, the moving party "has no burden to disprove unsupported claims of his opponent." Pueblo Neighborhood Health Ctrs. v. Losavio, 847 F.2d 642, 649 (10th Cir. 1988) (citing Celotex, 477 U.S. at 324; Anderson, 477 U.S. at 247-50).

Summary judgment is appropriate where "there is no genuine issue as to any material fact," Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986); Windon Third Oil & Gas Drilling Partnership v. Federal Deposit Ins. Corp., 805 F.2d 342, 345 (10th Cir. 1986), cert. denied, 480 U.S. 947 (1987), and "the moving party is entitled to judgment as a matter of law," Fed. R. Civ. P. 56(c). In Celotex, the Supreme Court stated:

> [t]he plain language of Rule 56 (c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial.

477 U.S. at 322.

A party opposing a properly supported motion for summary judgment must offer evidence, in admissible form, of specific facts, Fed. R. Civ. P. 56(e), sufficient to raise a "genuine issue of material fact." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247-48 (1986) ("The mere existence of some alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment."). "Factual disputes that are irrelevant or unnecessary will not be counted." Id. at 248.

Summary judgment is only appropriate if "there is [not] sufficient evidence favoring the nonmoving party for a jury to return a verdict for that party." Id. at 250. The Supreme Court stated:

> [t]he mere existence of a scintilla of evidence in support of the plaintiff's position will be insufficient; there must be evidence on which the jury could reasonably find for the plaintiff.

Id. at 252. Thus, to defeat a summary judgment motion, the nonmovant "must do more than simply show that there is some metaphysical doubt as to the material facts." Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 585-86 (1986); Anderson, 477 U.S. at 250 ("There is no issue for trial unless there is sufficient evidence favoring the nonmoving party for a jury to return a verdict for that party. If the evidence is merely colorable, or is not significantly probative, summary judgment may be granted." (citations omitted)).

In essence, the inquiry for the Court is "whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." Anderson, 477 U.S. at 250.

II.

Mr. Whatley claims that the City deprived him of a property interest in his continued employment without affording him due process of law. As a threshold matter, Mr. Whatley must be able to establish that he had a property right in his continued employment. See Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532 (1985). Whether an employee has a protected property interest in his position is purely a question of law to be determined by the court. Driggins v. City of Oklahoma City, 954 F.2d 1511, 1513 (10th Cir. 1992), cert. denied, 113 S.Ct. 129 (1993).

> Property interests, of course, are not created by the Constitution. Rather, they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law -- rules or understandings that secure certain benefits and that support claims of entitlement to those benefits.

Board of Regents v. Roth, 408 U.S. 564, 577 (1972). Thus, the sufficiency of Mr. Whatley's claim of entitlement "must be decided by reference to state law." Bishop v. Wood, 426 U.S. 341, 344 (1976); Driggins, 954 F.2d at 1513.

Oklahoma recognizes the employment at-will doctrine. Carnes v. Parker, 922 F.2d 1506, 1510 (10th Cir. 1991).

> In the absence of an implied or express agreement between the employer and its employees, the employer may terminate an employee at any time with or without cause. The Oklahoma Supreme Court has refused to recognize an implied covenant of good faith and fair dealing in employment at-will contracts.

Id. (citations omitted). Thus, Mr. Whatley must be able to establish the existence of an express or implied agreement which alters his statutus as an at-will employee.

The Amended City Charter for the City of Bartlesville provides that the City Manager "shall have the power and shall be required to [a]ppoint and, when necessary for the good of the service, remove all administrative officers and employees of the city . . . ." Charter, Art. 5, § 11(a); see id. at Art. 6, § 3. It is well established under Oklahoma law that employment conditioned on 'for the good of the service' does not give rise to a cognizable property interest for due process purposes. See, e.g., Phillips v. Calhoun, 956 F.2d 949, 953 (10th Cir. 1991). Mr. Whatley therefore must allege some other source of authority for his alleged property interest in continued employment.

Mr. Whatley contends that his property interest arose from two categories of law. First, he claims that his designation as a Bartlesville police "officer" entitles him to the statutory protection afforded state "officers" in the Oklahoma statutes. Specifically, he relies upon 22 O.S. §§ 1181, 1182. The Court finds that such reliance is misplaced. The cited statutes are criminal procedure statutes that regulate the removal of elected and appointed officials from office. Nothing in these statutes is relevant to personnel decisions regarding city employees.

Mr. Whatley further contends that he has a right to continued employment based on the fact that the City provides certain procedural protections in the employment context. He asserts that the various disciplinary guidelines set forth in the City of Bartlesville Personnel Rules and Regulations and the Bartlesville Police Department Rules and Regulations "create" a for-cause employment relationship "in that they mandate certain procedural processes in matters of employee discipline." Pl.'s Resp. Br. at 66. The Tenth Circuit, however, has expressly rejected this argument, stating:.

> By themselves . . . these procedural protections do not support a 'legitimate claim of entitlement' to future employment. At best, they merely support a claim of entitlement to the procedural protections themselves. At least five circuits have

> adopted the view that procedural protections alone do not create a protected property right in future employment; such a right attaches only when there are substantive restrictions on the employer's discretion.

Campbell v. Mercer, 926 F.2d 990, 993 (10th Cir. 1991) (quoting Asbill v. Housing Auth. of Choctaw Nation, 726 F.2d 1499, 1502 (10th Cir. 1984)).

The Court therefore concludes that Mr. Whatley did not have a property interest in his continued employment entitling him to invoke the protections of the Due Process Clause. Summary judgment in favor of the City is therefore appropriate.

III.

Mr. Whatley also asserts that the City violated his liberty interests by allegedly publicizing false and defamatory statements about him. To establish a claim for a violation of due process, Mr. Whatley must articulate how the City infringed upon his liberty interests.

> First, to be actionable, the statements must impugn the good name, reputation, honor, or integrity of the employee. Second, the statements must be false. Third, the statements must occur in the course of terminating the employee or must foreclose other employment opportunities. And fourth, the statements must be published. These elements are not disjunctive, all must be satisfied to demonstrate deprivation of the liberty interest.

Workman v. Jordan, 32 F.3d 475, 481 (10th Cir. 1994) (citations omitted). Construing the record in the light most favorable to Mr. Whatley, the Court concludes that his allegations fail to satisfy those requirements for a due process claim based on violation of liberty interests.

In his Complaint, Mr. Whatley apparently based his liberty interest claim upon statements made by Police Chief Thomas R. Holland on January 9, 1991. Pl.'s Compl. ¶ 6.[2] The Complaint alleges:

> On this occasion, Defendant Holland, acting in his official capacity and under color of state law, engaged in an illusive, devious and coercive act in which he purposely

---

[2]Plaintiff alludes to liberty interest violations in four other paragraphs of the Complaint. Pl.'s Compl. at ¶¶ 5, 7-9. The Court, however, finds no arguable basis upon which to find an infringement upon Mr. Whatley's liberty interest on the facts set forth in those paragraphs.

> misused and knowingly misrepresented to plaintiff police department records taken out of context, which record falsely reported information to Defendant Holland an incident alleging off-duty misconduct on plaintiff's part. Defendant Holland denied the plaintiff information regarding the identity of the false accuser, denied plaintiff access to the full record, and denied plaintiff an opportunity to respond to the stigmatizing and defamatory statements represented in the information that placed plaintiff's personal honor and professional reputation at stake. Nevertheless, Defendant Holland used said false information against plaintiff in a coercive attempt to force plaintiff's resignation in an official setting wherein the plaintiff was presented with accusatory material alleging misconduct, and where the imposition of disciplinary action by the City of Bartlesville against the plaintiff was under consideration. At the conclusion of this meeting, Defendant Holland provided plaintiff with a document that the defendant alleged to be a full and complete record of the verbal content communicated to plaintiff by Defendant Holland in said meeting. However, Defendant Holland had by contrivance and manipulation omitted from that document any reference to the false and defamatory accusations that he had just presented to plaintiff in a coercive attempt to force plaintiff's resignation. Defendant Holland's actions of January 9, 1991 deprived the plaintiff of his rights to substantive and procedural due process and his liberty interests under Article VI of the City of Bartlesville Personnel Rules and Regulations manual and the Fourteenth Amendment to the United States Constitution.

Id. The Court concludes that the allegations set forth in Plaintiff's complaint fail to allege a violation of a protected liberty interest. Most notably, Plaintiff does not allege that the allegedly false and defamatory statements were published. Although Mr. Whatley's transcription of the meeting indicates that Police Captain John Bevard was also present at the January 9, 1991 meeting, "such intragovernment dissemination, by itself, falls short of the Supreme Court's notion of publication: 'to be made public.'" Asbill, 726 F.2d at 1503.

Because Mr. Whatley is proceeding in this action pro se, the Court will construe his pleadings liberally. See Hall v. Bellmon, 935 F.2d 1106, 1110 (10th Cir. 1991). Therefore, the Court notes that Mr. Whatley has alleged additional facts in brief which he claims further support his claim of a liberty interest violation. He includes as exhibits various newspaper articles from the Bartlesville-area press. Pl.'s App., Vol. IV, Exs. SS, TT, UU, VV, WW. Two of the stories report on the civil right actions citizens filed against the City which alleged misconduct on the part of Mr. Whatley during his tenure with the Bartlesville Police. Nothing in those articles indicated that the authors of the stories had received any information from the City regarding Mr. Whatley's

involvement that was not a matter of public record. In fact, one article states, "Mark Whatley, who was involved in three claims, was fired from the police force in January, but police and city officials have not said why." Ex. SS. These articles, therefore, clearly do not constitute evidence of a due process violation.

The remaining articles report on a petition filed by Mr. Whatley requesting a grand jury investigation into alleged wrongdoing in city and county government. Exs.TT, UU, VV, WW. The only statement by a City official regarding Mr. Whatley was Chief Holland's comment, "I will make available to a grand jury the entire files of the Bartlesville Police Department, including the four volumes I have on Mark Whatley." Even if the Court construed this statement in itself as damaging to Mr. Whatley's character, he has failed to allege that the substance of the statement, i.e., that the Bartlesville Police Department had four volumes of files regarding Mr. Whatley, was false. The Court thus concludes that, construing the evidence in the light most favorable to Mr. Whatley, his claim for a liberty interest violation is not supported by the facts of this case.

In summary, the Court holds that Mr. Whatley has failed to allege facts sufficient to establish a deprivation of either a property or liberty interest. The City's Motion for Summary Judgment is hereby granted (Docket #10).

IT IS SO ORDERED.

This 1st day of March, 1996.

Sven Erik Holmes
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

MARK HOUSTON WHATLEY,

Plaintiff,

v.

CITY OF BARTLESVILLE, OKLAHOMA, a municipal corporation; THOMAS R. HOLLAND, former Chief of Police; and ROBERT E. METZINGER, City Manager,

Defendants.

Case No. 95-C-153-H

JUDGMENT

This Court entered an order on August 23, 1995, dismissing Defendants Thomas R. Holland and Robert E. Metzinger. On March 1, 1996, the Court entered an order granting summary judgment in favor of Defendant City of Bartlesville.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that judgment is hereby entered for Defendants and against Plaintiff.

IT IS SO ORDERED.

This 1st day of March, 1996.

Sven Erik Holmes
United States District Judge

32

FILED

MAR - 1 1996

Richard M. Lawrence, Court Clerk
U.S. DISTRICT COURT

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

MANHATTAN CONSTRUCTION COMPANY,

Plaintiff,

vs.

ROTEK, INC., DEFONTAINE-DEFINOX DIV., BERCO CRAWLER SYSTEMS, an Ohio corporation,

Defendant.

Case No. 95-C-498-H

ENTERED ON DOCKET

DATE 3-4-96

STIPULATION OF DISMISSAL

COME NOW the parties hereto and stipulate that the above-captioned matter may be, and is hereby, dismissed with prejudice to each party's right to refile same.

Respectfully submitted

RHODES, HIERONYMUS, JONES, TUCKER & GABLE

By: _____

William S. Leach, OBA #14892 P.O. Box 21100
Tulsa, Oklahoma 74121-1100 Oneok Plaza
100 W. 5th Street, Suite 400 Tulsa, Oklahoma 74103-4287 (918) 582-1173
Attorney for Defendant

SAVAGE, O'DONNELL, SCOTT, MCNULTY, AFFELDT & GENTGES

By: _____

Alan W. Gentges, OBA #11315
M. Alan Souter, OBA #15846
601 S. Boulder, Ste. 1100
Tulsa, Oklahoma 74119-1333
(918) 599-9000
Attorneys for Plaintiff

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

FILED

MAR - 1 1996

Richard M. Lawrence, Clerk
U. S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

WENDELL TENISON and BETTY TENISON, individually and as husband and wife;	)	
Plaintiffs,	)	
vs.	)	CIV 96-C-35-BU
THE BIXBY PUBLIC WORKS AUTHORITY, a Public Trust;	)	
Defendant	)	

ENTERED ON DOCKET
DATE MAR 3 1996

DISMISSAL WITH PREJUDICE

COMES NOW, the Plaintiffs, and would show that this matter has been settled and should now be dismissed with prejudice.

Respectfully submitted,
TOM C. LANE, Sr. AND ASSOCIATES

By: Tom C. Lane

TOM C. LANE, Sr. OBA #12746
P.O. Box 384
Sapulpa, Oklahoma 74067-0384
(918) 224-2889

CERTIFICATE OF MAILING

The undersigned certifies that on this 12th day of February, 1996 a true and correct copy of the above aforegoing instrument was mailed with proper postage thereon prepaid:

Eller and Detrich
John Lieber
2727 East 21st Street
Suite 200, Midway Building
Tulsa, OK 74114

Tom C. Lane

TOM C. LANE, Sr.

-3

C/M/D
mail

IN THE UNITED STATES DISTRICT COURT FOR THE

NORTHERN DISTRICT OF OKLAHOMA

WENDELL TENISON and BETTY TENISON, individually and as husband and wife,

Plaintiffs,

vs.

BIXBY PUBLIC WORKS AUTHORITY,

Defendant.

Case No. 96-C-35-BU

ADMINISTRATIVE CLOSING ORDER

As the parties have reached a settlement and compromise of this matter, it is ordered that the Court Clerk administratively terminate this action in his records without prejudice to the rights of the parties to reopen the proceeding for good cause shown, for the entry of any stipulation or order, or for any other purpose required to obtain a final determination of the litigation.

If the parties have not reopened this case within 30 days of this date for the purpose of dismissal pursuant to the settlement and compromise, the plaintiffs' action shall be deemed to be dismissed with prejudice.

ENTERED this 31st day of January, 1996.

Michael Burrage

MICHAEL BURRAGE
UNITED STATES DISTRICT JUDGE

NOTE: THIS ORDER IS TO BE MAILED BY MOVANT TO ALL COUNSEL AND PRO SE LITIGANTS IMMEDIATELY UPON RECEIPT.

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF OKLAHOMA

JOHN L. DICKERSON, III
an individual, plaintiff

C. A. NO. 95CV 855BU

VERSUS

PICCADILLY CAFETERIAS, INC.
a corporation, defendant

ORDER ACKNOWLEDGING STIPULATION TO DISMISS WITH PREJUDICE

Plaintiff, JOHN L. DICKERSON, III, and defendant, PICCADILLY CAFETERIAS, INC., have stipulated to dismissal with prejudice of this action, and the Court, in keeping with this stipulation by the parties, orders this case dismissed with prejudice.

Dated this 28 day of Feb, 1996.

Judge, U.S. District Court

IN THE UNITED STATES DISTRICT COURT
OF THE NORTHERN DISTRICT OF OKLAHOMA

GARY BLACK and SARA KERBY, Individually, and as Guardians And Next Friends of RACHALE BROWN and PHILLIP BROWN, minor children, Plaintiffs	§	NO. 95-C 123BU
vs.	§	
CHRYSLER CORPORATION, A Foreign Corporation, and MITSUBISHI MOTOR CORPORATION, A Foreign Corporation, Defendants	§	

FINAL JUDGMENT

This matter comes before the court on this 23rd day of February, 1996. Plaintiff Sara Kerby was present, along with her counsel, John Thetford of The Stipe Law Firm. Defendants appeared via telephone through their counsel, Ken Ferguson of the law firm of Clark, Thomas & Winters.

The Court finds that, subject to its approval, the parties have reached a resolution of the case as set forth in the Complete Release, Indemnity, Confidentiality, and Settlement Agreement (the "Settlement Agreement"), which the Court has reviewed and about which the Court has heard and considered evidence.

After hearing evidence with reference to the accident in question and all matters pertaining to the purported liability of the Defendants and the nature and extent of damages allegedly sustained by the Plaintiffs, the Court finds as follows:

1. On or about April 26, 1994, Gary Black, Sara Kerby, Phillip Brown and Rachale Brown were involved in an automobile accident that involved a 1983 Plymouth Sapporo (the "Subject Vehicle"). Philip Brown and Rachale Brown

sustained only minor injuries in the accident, and did not require hospitalization.

2. Gary Black, individually, and Sara Kerby, in her individual and representative capacities, have freely entered into the Settlement Agreement with the Defendants.

3. Sara Kerby is the natural mother of Phillip Brown and Rachale Brown. The injuries sustained by Phillip Brown and Rachale Brown in the accident were minor in nature. The funds paid for their use and benefit through the Settlement Agreement ($550 for the benefit of Rachale Brown; $550 for the benefit of Phillip Brown), which the Court finds to be reasonable under the circumstances, are less than $1,000.00. As such, appointment of a Guardian Ad Litem is not required under Okla. Stat. Tit. 23, § 83, nor is it necessary to deposit the settlement funds as set out in that statute.

4. Plaintiffs, in their individual and representative capacities, and the Defendants on the other hand, have agreed upon a full and final settlement and compromise of any and all claims, demands and causes of action that may or might have arisen out of the accident in question or the design, manufacture, or marketing of the Subject Vehicle.

5. Plaintiffs Gary Black, individually, and Sara Kerby, in her individual and representative capacities, have read and have been apprised of the terms and conditions of the Settlement Agreement. Plaintiffs, in their individual and representative capacities, have fully informed themselves with regard to the facts alleged in Plaintiffs' pleadings, the nature and extent of the alleged liability of Defendants, and the nature and extent of the injuries and damages sustained by the Plaintiffs. Plaintiffs are aware that they and the minor children have a right to trial in this matter, and have agreed to waive that right by way of the Settlement Agreement. Plaintiffs have agreed to settle and compromise the captioned matter for a sum about which the Court has heard evidence and which the Court recognizes as being just and fair under the facts and circumstances.

IT IS THEREFORE FURTHER ORDERED, ADJUDGED, AND DECREED by the Court that this Final Judgment is fully satisfied; that this Final Judgment shall operate as a full and complete release of the Defendants from any and all claims, demands or causes of action

that were or might have been asserted against them in this cause related to the subject accident and/or the design, manufacture, or marketing of the Subject Vehicle; and, that each party shall bear its own attorneys' fees, expenses, and court costs.

SIGNED this 27 day of Feb, 1996.

s/ MICHAEL BURRAGE

JUDGE PRESIDING

APPROVED AS TO FORM AND CONTENT:

CLARK, THOMAS & WINTERS,
A Professional Corporation

By: _____

Chris Pearson
Oklahoma Bar No. 10925
Post Office Box 1148
Austin, Texas 78767
(512) 472-8800 (Telephone)
(512) 474-1129 (Telecopier)

ATTORNEYS FOR DEFENDANTS

STIPE LAW FIRM

By: _____

John M. Thetford
Oklahoma Bar No. 12892
Post Office Box 701110
Tulsa, Oklahoma 74170-1110
(918) 749-0749 (Telephone)

ATTORNEY FOR PLAINTIFFS

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA, Plaintiff, vs. REBECCA K. POGUE aka REBECCA K. THOMISON; STATE OF OKLAHOMA ex rel OKLAHOMA TAX COMMISSION; RED CROWN FEDERAL CREDIT UNION; COUNTY TREASURER, Tulsa County, Oklahoma; BOARD OF COUNTY COMMISSIONERS, Tulsa County, Oklahoma, Defendants.	)	Civil Case No. 95-CV 998BU

JUDGMENT OF FORECLOSURE

This matter comes on for consideration this 29th day of February, 1996. The Plaintiff appears by Stephen C. Lewis, United States Attorney for the Northern District of Oklahoma, through Loretta F. Radford, Assistant United States Attorney; the Defendants, COUNTY TREASURER, Tulsa County, Oklahoma, and BOARD OF COUNTY COMMISSIONERS, Tulsa County, Oklahoma, appear by Dick A. Blakeley, Assistant District Attorney, Tulsa County, Oklahoma; the Defendant, STATE OF OKLAHOMA ex rel OKLAHOMA TAX COMMISSION, appears not having previously filed its Disclaimer; and the Defendants, REBECCA K. POGUE aka REBECCA K. THOMISON and RED CROWN FEDERAL CREDIT UNION, appear not, but make default.

The Court being fully advised and having examined the court file finds that the Defendant, REBECCA K. POGUE aka REBECCA K. THOMISON will hereinafter be

referred to as ("REBECCA K. POGUE"). REBECCA K. POGUE is a single, unmarried person.

The Court being fully advised and having examined the court file finds that the Defendant, REBECCA K. POGUE, waived service of Summons on January 5, 1996; and that the Defendant, RED CROWN FEDERAL CREDIT UNION, acknowledged receipt of Summons and Complaint via certified mail on October 10, 1995.

It appears that the Defendants, COUNTY TREASURER, Tulsa County, Oklahoma, and BOARD OF COUNTY COMMISSIONERS, Tulsa County, Oklahoma, filed their Answer on October 12, 1995; that the Defendant, STATE OF OKLAHOMA ex rel OKLAHOMA TAX COMMISSION, filed its Disclaimer on October 25, 1995; and that the Defendants, REBECCA K. POGUE and RED CROWN FEDERAL CREDIT UNION, have failed to answer and their default has therefore been entered by the Clerk of this Court.

The Court further finds that this is a suit based upon a certain mortgage note and for foreclosure of a mortgage securing said mortgage note upon the following described real property located in Tulsa County, Oklahoma, within the Northern Judicial District of Oklahoma:

> Lot thirteen (13), Block Four (4) BRIARWOOD, an Addition in Tulsa County, State of Oklahoma, according to the recorded plat thereof.

The Court further finds that on April 20, 1978, the Defendant, REBECCA K. POGUE and Michael E. Pogue, executed and delivered to WESTERN PACIFIC FINANCIAL CORPORATION their mortgage note in the amount of $42,650.00, payable in monthly installments, with interest thereon at the rate of 8.75% per annum.

The Court further finds that as security for the payment of the above-described note, the Defendant, REBECCA K. POGUE, and Michael E. Pogue, then husband and wife, executed and delivered to WESTERN PACIFIC FINANCIAL CORPORATION a mortgage dated April 20, 1978, covering the above-described property. Said mortgage was recorded on April 27, 1978, in Book 4324, Page 1234, in the records of Tulsa County, Oklahoma.

The Court further finds that on June 1, 1978, WESTERN PACIFIC FINANCIAL CORPORATION assigned the above-described mortgage note and mortgage to FEDERAL NATIONAL MORTGAGE ASSOCIATION. This Assignment of Mortgage was recorded on July 24, 1978, in Book 4342, Page 61, in the records of Tulsa County, Oklahoma.

The Court further finds that on July 14, 1989, SHEARSON LEHMAN MORTGAGE CORPORATION by Attorney in fact for FEDERAL NATIONAL MORTGAGE ASSOCIATION assigned the above-described mortgage note and mortgage to the Secretary of Housing and Urban Development of Washington, D.C., his successors and assigns. This Assignment of Mortgage was recorded on August 4, 1989, in Book 5199, Page 563, in the records of Tulsa County, Oklahoma.

The Court further finds that on December 8, 1980, a divorce decree was entered against Michael E. Pogue, in case number JFD 80-5580 in Tulsa District Court, Tulsa County, Oklahoma. Michael E. Pogue granted a Quit Claim Deed to the Defendant, REBECCA K. POGUE, dated December 4, 1980, and recorded on December 12, 1980 in Book 4515, Page 2042, in the records of Tulsa County, Oklahoma.

The Court further finds that on June 1, 1989, the Defendant, REBECCA K. POGUE, entered into an agreement with the Plaintiff lowering the amount of the monthly

installments due under the note in exchange for the Plaintiff's forbearance of its right to foreclose. A superseding agreement was reached between these same parties on July 23, 1990, June 1, 1991, and May 1, 1992.

The Court further finds that the Defendant, REBECCA K. POGUE, made default under the terms of the aforesaid note and mortgage, as well as the terms and conditions of the forbearance agreements, by reason of her failure to make the monthly installments due thereon, which default has continued, and that by reason thereof the Defendant, REBECCA K. POGUE, is indebted to the Plaintiff in the principal sum of $66,929.37, plus interest at the rate of 8.75 percent per annum from April 1, 1995 until judgment, plus interest thereafter at the legal rate until fully paid, and the costs of this action.

The Court further finds that the Defendant, COUNTY TREASURER, Tulsa County, Oklahoma, has a lien on the property which is the subject matter of this action by virtue of personal property taxes in the amount of $34.00 which became a lien on the property as of June 23, 1994; and a lien in the amount of $33.00 which became a lien as of June 25, 1993. Said liens are inferior to the interest of the Plaintiff, United States of America.

The Court further finds that the Defendants, REBECCA K. POGUE and RED CROWN FEDERAL CREDIT UNION, are in default, and have no right, title or interest in the subject real property.

The Court further finds that the Defendant, STATE OF OKLAHOMA ex rel OKLAHOMA TAX COMMISSION, disclaims any right, title, or interest in the subject real property.

The Court further finds that the Defendant, BOARD OF COUNTY COMMISSIONERS, Tulsa County, Oklahoma, claims no right, title or interest in the subject real property.

The Court further finds that pursuant to 12 U.S.C. 1710(1) there shall be no right of redemption (including in all instances any right to possession based upon any right of redemption) in the mortgagor or any other person subsequent to the foreclosure sale.

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that the Plaintiff, the United States of America, acting on behalf of the Secretary of Housing and Urban Development, have and recover judgment against the Defendant, REBECCA K. POGUE, in the principal sum of $66,929.37, plus interest at the rate of 8.75 percent per annum from April 1, 1995 until judgment, plus interest thereafter at the current legal rate of 5.00 percent per annum until paid, plus the costs of this action, plus any additional sums advanced or to be advanced or expended during this foreclosure action by Plaintiff for taxes, insurance, abstracting, or sums for the preservation of the subject property.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Defendant, COUNTY TREASURER, Tulsa County, Oklahoma, have and recover judgment in the amount of $67.00, plus costs and interest, for personal property taxes for the years 1992 and 1993, plus the costs of this action.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Defendants, REBECCA K. POGUE, STATE OF OKLAHOMA ex rel OKLAHOMA TAX COMMISSION, RED CROWN FEDERAL CREDIT UNION and BOARD OF COUNTY COMMISSIONERS, Tulsa County, Oklahoma, have no right, title, or interest in the subject real property.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that upon the failure of said Defendant, REBECCA K. POGUE, to satisfy the money judgment of the Plaintiff herein, an Order of Sale shall be issued to the United States Marshal for the Northern District of Oklahoma, commanding him to advertise and sell according to Plaintiff's election with or without appraisement the real property involved herein and apply the proceeds of the sale as follows:

First:

In payment of the costs of this action accrued and accruing incurred by the Plaintiff, including the costs of sale of said real property;

Second:

In payment of the judgment rendered herein in favor of the Plaintiff;

Third:

In payment of Defendant, COUNTY TREASURER, Tulsa County, Oklahoma, in the amount of $67.00, personal property taxes which are currently due and owing.

The surplus from said sale, if any, shall be deposited with the Clerk of the Court to await further Order of the Court.

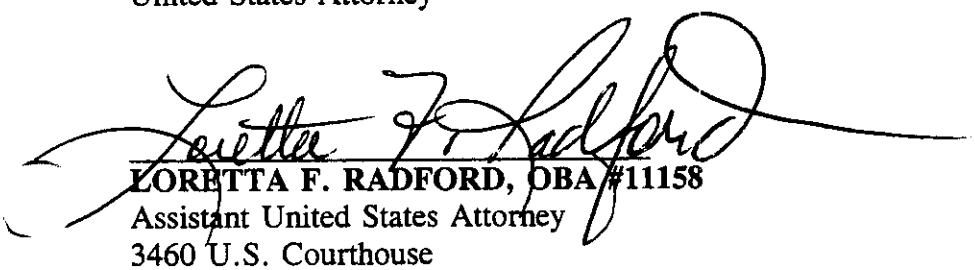
IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that pursuant to 12 U.S.C. 1710(1) there shall be no right of redemption (including in all instances any right to possession based upon any right of redemption) in the mortgagor or any other person subsequent to the foreclosure sale.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that from and after the sale of the above-described real property, under and by virtue of this judgment and decree, all of the Defendants and all persons claiming under them since the filing of the Complaint, be and they are forever barred and foreclosed of any right, title, interest or claim in or to the subject real property or any part thereof.

s/ MICHAEL BURRAGE
UNITED STATES DISTRICT JUDGE

APPROVED:

STEPHEN C. LEWIS
United States Attorney



LORETTA F. RADFORD, OBA #11158
Assistant United States Attorney
3460 U.S. Courthouse
Tulsa, Oklahoma 74103
(918) 581-7463

DICK A. BLAKELEY, OBA #852
Assistant District Attorney
406 Tulsa County Courthouse
Tulsa, Oklahoma 74103
(918) 596-4842
Attorney for Defendants,
County Treasurer and
Board of County Commissioners,
Tulsa County, Oklahoma

Judgment of Foreclosure
Civil Action No. 95-CV 998BU
LFR/lg

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

CAROL GOFORTH and KATHERINE SANDERS,

Plaintiff,

vs.

ROY G. McCLELLAN and OK BINGO SUPPLY, INC.,

Defendant.

Civil Action No. 95-C-533-K

STIPULATION FOR DISMISSAL

COME NOW the Plaintiffs, Carol Goforth and Katherine Sanders, and pursuant to Rule 4(a)(1) presents this Stipulation for Dismissal without prejudice of the above captioned case. Plaintiffs and Defendant O.K. Bingo Supply, Inc., hereby stipulate that the above matters should be dismissed without prejudice in and for the reason that Defendant OK Bingo Supply, Inc. is in the process of a bankruptcy proceeding. Defendant Roy G. McClellan was not served with a copy of the Complaint.

It is therefore requested by the Plaintiffs, Carol Goforth and Katherine Sanders, and the Defendants, Roy G. McClellan and OK Bingo Supply, Inc., that this Honorable Court approve and cause to be filed the Dismissal without prejudice submitted herewith dismissing this cause

of action and ordering that each party pay its own respective costs of prosecuting and defending this matter.

CAROL GOFORTH and KATHERINE SANDERS,
Plaintiffs

By: Nathan H. Young III by SKS

NATHAN H. YOUNG III (OBA #9970)
239 West Keetoowah
Tahlequah, OK 74464
(918) 456-8900

JAMES G. WILCOXEN (OBA #9605)
112 N. 5th Street
P. O. Box 357
Muskogee, OK 744022-0357
(918) 683-6696
ATTORNEYS FOR PLAINTIFFS

ARRINGTON KIHLE GABERINO & DUNN,
a Professional Corporation

By: Sidney K. Swinson

SIDNEY K. SWINSON, OBA #8804
REBECCA BRETT, OBA #14190
100 West 5th, Suite 1000
Tulsa, OK 74103-4219
(918) 585-8141